(11)

No. 00-1045-CFX   Title: TRW Inc., Petitioner
v.
Adelaide Andrews

Docketed: December 27, 2000   Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Dec 22 2000	Petition for writ of certiorari filed. (Response due January 26, 2001)
	Jan 26 2001	Brief of respondent Adelaide Andrews in opposition filed.
	Jan 26 2001	Brief amici curiae of Associated Credit Bureaus, Inc., et al. filed.
	Feb 6 2001	Reply brief of petitioner TRW Inc. filed.
	Feb 7 2001	DISTRIBUTED for Conference of February 23, 2001
	Feb 26 2001	REDISTRIBUTED for Conference of March 2, 2001
	Mar 5 2001	Petition GRANTED. SET FOR ARGUMENT October 9, 2001.
		**
	Apr 19 2001	Motion of petitioner for leave to file a supplemental joint appendix under seal filed.
	Apr 19 2001	Joint appendix filed.
	Apr 19 2001	Brief of petitioner TRW Inc. filed.
	Apr 20 2001	LODGING consisting of twenty copies of CA Dept. of Consumer Affairs concerning AB 156, submitted by counsel forthe petitioner.
	Apr 24 2001	Motion DISTRIBUTED. May 10, 2001 (Page 15)
	May 14 2001	Motion of petitioner for leave to file a supplemental joint appendix under seal GRANTED.
	May 21 2001	Order extending time to file respondent's brief on the merits to and including May 30, 2001.
	May 29 2001	Brief of respondent Adelaide Andrews filed.
	May 30 2001	Brief amici curiae of National Association of Consumer Advocates, et al. filed.
	May 30 2001	Brief amici curiae of United States and Federal Trade Commission filed.
	Jun 12 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jun 28 2001	Reply brief of petitioner TRW Inc. filed.
	Jun 29 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Jul 20 2001	CIRCULATED.
	Jul 25 2001	Record filed.
	Aug 9 2001	Record filed.
	Oct 9 2001	ARGUED.

(1)

Supreme Court, U.S.
FILED

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No. 00-____

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

TRW INC.,

Petitioner,

v.

ADELAIDE ANDREWS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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109 pp

QUESTION PRESENTED

Section 618 of the Fair Credit Reporting Act, as amended, 15 U.S.C. § 1681 *et seq.*, generally requires suits to enforce the Act to be brought "within two years from the date on which liability arises." 15 U.S.C. § 1681p. This section contains an exception for certain willful misrepresentations, which permits suits based upon such misrepresentations to be brought "at any time within two years after discovery by the individual of the misrepresentation." *Id.* In the decision below, the Ninth Circuit found that Section 618 also implicitly incorporates the so-called discovery rule and held that, even in the absence of any willful misrepresentation falling within the statutory exception, the statute of limitations in this section did not begin to run until discovery of injury. Accordingly, the question presented here is:

> Whether Section 618 of the Fair Credit Reporting Act contains an implicit exception incorporating the discovery rule that permits a suit for violation of the Act to be brought within two years of the date of the discovery of the injury even in the absence of any willful misrepresentation.

PARTIES TO THE PROCEEDINGS

TRW Inc. is publically owned and, as such, is not owned by any parent corporations. TRW Inc. owns, directly or indirectly, interests in the following nonwholly owned subsidiaries and affiliates:

ABC Sistemas e Modulos Ltda.
ACTS - Advanced Car Technology Systems Verwaltungs
ACTS - Advanced Car Technology Systems GmbH & Co. KG
Aguirre Safety Technologies, L.L.C.
Airwork-Vinnell
Atlas Minerals Inc.
BDM Services Arabia Ltd.
Brakes India Limited
Compania Espanola de Sistemas Aeronauticos S.A.
Componentes Venezolanos de Direccion, S.A.
Electrosource Inc.
Eurofen Investments S de R de C.V.
Eyematic Interfaces, Inc.
Faw-Kelsey-Hayes Automobile Chassis System, Co., Ltd.
FUJI OOZX Inc.
Gesellschaft fur Umweltmanagement und Risikoservice GmbH
GmbH (UMR)
Goldwyn Limited
Hopewell International Insurance Limited
IABG Holding GmbH
Imoval S/C Ltda.
India Nippon Electrical Ltd.
Inlake Insurance Limited
Les Minquiers Limited
Link Plus Corporation
Lucas Dizel Sanayi VE Ticaret AS
Lucas Elektrik Sanayi VE Ticaret AS
Lucas TVS-Diesel Systems Limited

Lucas TVS Limited
LucasVarity Langzhong Brake Company Limited
Meads, LLC
Methode Lucas Controls, Inc.
Monitoring Technology Corporation
Moresa, S.A.
Nippon Stud Welding Company, Ltd.
PT TRW Pindad Aeronautical Systems Indonesia
Quality Safety Systems Company
Rane Engine Valve Limited
Revestimientos Especiales de Mexico srl de CV
RF Micro Devices, Inc.
Roulunds Lucas A/S
Roulunds Lucas Huanshi Friction Co. Ltd.
Saudi Strategic Services Company, Ltd.
Seavin Joint Venture (Day & Zimmerman Services-Vinnell)
Shanghai TRW Automotive Safety Systems Co., Ltd.
Shin Han Valve Industrial Company, Ltd.
SM-Sistemas Modulares Ltda.
SmarTire Systems Inc.
TECOM-Vinnell Services
The Bingley Exhibition Hall Co. Ltd.
The Imagex Corporation
The Titan Corporation
Toyoda TRW Automotive Inc.
Trans World Airlines
TRW (Ningbo) Fastening Systems Co. Ltd.
TRW (Shanghai) Engine Valve Co., Ltd.
TRW (Suzhou) Automotive Electronics Co., Ltd.
TRW Advanced Plastic Technologies GmbH & Co. KG
TRW Automotive Japan Co. Ltd.
TRW-DAS a.s.
TRW Direcciones de Vehiculos S.A.
TRW Endiksan Automotive Safety Systems A.S.
TRW Fuji Serina Co., Ltd.
TRW Fuji Valve Inc.

TRW Occupant Restraint Systems (Ventures) Ltd.
TRW Parsons Management & Operations LLC
TRW Powder Metal Inc.
TRW Rane Occupant Restraints Limited
TRW Sabelt S.p.A.
TRW Steering & Suspension (Malaysia) Sdn. Bhd.
TRW Steering Co. Ltd.
TRW Systems Arabia Ltd.
TRW TAECO Aeronautical Systems (Xiamen) Company Ltd
Varga Comercio e Representacao Ltda
Vertical Circuits, Inc.
Vinnell Arabia Ltd.
Vinnell-Brown & Root
Wu Chou Valve Industrial Co., Ltd.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 8

I. THE NINTH CIRCUIT'S CONSTRUCTION OF THE FAIR CREDIT REPORTING ACT CONTRADICTS THE DECISIONS OF AT LEAST FOUR OTHER COURTS OF APPEALS . 8

II. THE DECISION BELOW CONFLICTS WITH THE PLAIN LANGUAGE OF THE FAIR CREDIT REPORTING ACT 11

III. THIS CASE PRESENTS AN IMPORTANT AND RECURRING QUESTION THAT SHOULD BE RESOLVED BY THIS COURT . . 15

CONCLUSION 18

TABLE OF AUTHORITIES

CASES **Page**

Allen v. Equifax Credit Info. Serv., Inc.,
46 F.3d 1138, 1995 WL 21422
(9th Cir. Jan. 11, 1995) 7
Andrus v. Glover Constr. Co.,
446 U.S. 608 (1980) 10, 12
Batchelor v. First Nat'l Bank of Blue Island,
No. 92 C 5073, 1993 WL 22859
(N.D. Ill. Jan. 20, 1993) 16
Ben-Hur v. Equifax Info. Serv., Inc.,
976 F. Supp. 795 (E.D. Wis 1997) 16
Clark v. State Farm Fire & Cas. Ins. Co.,
54 F.3d 669 (10th Cir. 1995) 10, 11
Clay v. Equifax, Inc.,
762 F.2d 952 (11th Cir. 1985) 8, 10, 11
Edgar v. Reich,
881 F. Supp. 83 (D. Mass. 1995) 16
Gill v. Kostroff, No. 98-930-CIV-T-17A,
2000 WL 141258 (M.D. Fla. Feb. 8, 2000) 16
Holmberg v. Armbrecht,
327 U.S. 392 (1946) 14
Houghton v. Insurance Crime Prevention Inst.,
795 F.2d 322 (3d Cir.1986) 8, 9, 10, 11
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498 U.S. 89 (1990) 17
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521 U.S. 179 (1997) 13
*Lampf, Pleva, Lipkind, Prupis & Petigrew v.
Gilbertson*, 501 U.S. 350 (1991) 14
Lazar v. Trans Union LLC,
195 F.R.D. 665 (C.D. Cal. 2000) 16
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Serv. Co.*, No. 92-1730, 1993 WL 219257
(D.D.C. June 8, 1993) 16

McAnly v. Middleton & Reutlinger, P.S.C.,
77 F. Supp. 2d 810 (W.D. Ky. 1999) 16
McNamara v. Guazzoni, No. 98-CIV- 408-(HB),
1999 WL 322648 (S.D.N.Y. May 20, 1999) 16
Metropolitan Stevedore Co. v. Rambo,
515 U.S. 291 (1995) 11
Moskal v. United States,
498 U.S. 103 (1990) 11
NLRB v. Jones & Laughlin Steel Corp.,
301 U.S. 1 (1937) 12
Rylewicz v. Beaton Serv., Ltd.,
888 F.2d 1175 (7th Cir. 1989) 8, 9, 10, 11, 12
United States v. Beggerly,
524 U.S. 38 (1998) 14, 17
United States v. Brockamp,
519 U.S. 347 (1997) 14, 17
United States v. Smith,
499 U.S. 160 (1991) 12
Walters v. Metropolitan Educ. Enter., Inc.,
519 U.S. 202 (1997) 12
Way v. Barr, No. HAR 94-2519,
1995 WL 307525 (D. Md. May 15, 1995) 16
Wilson v. Porter, Wright, Morris & Arthur,
921 F. Supp. 758 (S.D. Fla. 1995) 16

STATUTES

5 U.S.C. § 552a *et seq* 8
5 U.S.C. § 552a(g)(5) 14
15 U.S.C. § 1681 *et seq* 1, 2
15 U.S.C. § 1681(a)(3) 2
15 U.S.C. § 1681b 3, 13
15 U.S.C. § 1681b(3) 3, 6
15 U.S.C. § 1681c 13
15 U.S.C. § 1681d 13
15 U.S.C. § 1681e(a) 3, 13
15 U.S.C. § 1681e(b) 4, 13

15 U.S.C. § 1681f 13
15 U.S.C. § 1681g 4
15 U.S.C. § 1681m(a) 4
15 U.S.C. § 1681n 4
15 U.S.C. § 1681o 4
15 U.S.C. § 1681p 1, 2, 4, 11, 12
18 U.S.C. § 1001 *et seq* 15
19 U.S.C. § 1621 14
28 U.S.C. § 1254(1) 1
42 U.S.C. § 9613(g) 14

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Jeffrey Rothfeder, *Privacy for Sale* (1992) 3
S. 823 91st Cong. 1st Session (1970) 12
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PETITION FOR A WRIT OF CERTIORARI

TRW Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit as amended (App. 1a) is reported at 225 F.3d 1063. The opinion of the district court (App. 10a) is reported at 7 F. Supp. 2d 1056.

JURISDICTION

The Ninth Circuit entered the decision below on July 17, 2000 and amended it on October 4, 2000. Both petitioner and respondent petitioned for rehearing or rehearing en banc, and the Ninth Circuit denied the petitions on September 29, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 618 of the Fair Credit Reporting Act, as amended, 15 U.S.C. § 1681 *et seq.*, provides in full:

> [a]n action to enforce any liability created under this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises, except that where a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this subchapter, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

15 U.S.C. § 1681p. Other relevant statutory provisions are reprinted at App. 65a-80a.

STATEMENT

The Fair Credit Reporting Act ("FCRA" or the "Act"), as amended, 15 U.S.C. § 1681 *et seq.*, contains a detailed statute of limitations. Specifically, Section 618 of the Act provides that private claims under the Act must generally be brought within two years of the time liability arises. *See* 15 U.S.C. § 1681p. Section 618 also contains an express exception for certain cases of willful misrepresentation which delays the running of the statute of limitations until "after discovery by the individual of the misrepresentation." *Id.* In the decision below, the Ninth Circuit implied an additional exception into Section 618 delaying the running of the Act's statute of limitations for all claims until discovery. As at least four courts of appeals have recognized, this interpretation cannot be reconciled with the plain language of the Act. Because the Ninth Circuit's ruling on this frequently recurring question will have far-reaching effects on the credit reporting industry, and because this case raises fundamental issues concerning the interpretation of express statute of limitations provisions, the decision below warrants review by this Court.

1. American consumers use credit to finance everything from the purchases of homes, cars, and appliances to tuition for college to everyday transactions using credit cards.[1] As Congress has expressly recognized, *see* 15 U.S.C. § 1681(a)(3), the credit reporting industry plays a vital role in making this credit freely available to consumers from all walks of life by providing credit providers with an estimated one billion credit reports each year that help banks, credit card

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[1] *See, e.g.*, Federal Trade Commission, *Fair Credit Reporting* (March 1999) *available at* http://www.ftc.gov/bcp/conline/pubs/credit/fcra.htm (visited December 18, 2000); Federal Trade Commission, *Ready, Set . . . Credit* (April 1999) *available at* http://www.ftc.gov/bcp/conline/pubs/young/readycrdt.htm (visited December 18, 2000).

companies, and other credit providers to gauge accurately the risk of extending credit to consumers. *See, e.g.*, Jeffrey Rothfeder, *Privacy for Sale* 43 (1992); Associated Credit Bureaus, Inc., *Who We Are*, *available at* http://acb.cyberserv.com/qs/Qspage.cfm?pageid=50 (visited December 19, 2000) ("ACB, *Who We Are*").

At the top of this multi-billion dollar a year industry, *see, e.g.*, U.S. Census Bureau, *1997 Economic Census, available at* http://www.census.gov/epcd/ec97/us/US000_56.HTM (visited December 21, 2000), are a handful of national credit bureaus — Trans Union, Equifax, and Experian (TRW's successor) — that receive computer records each month from creditors such as banks, retailers, and others detailing the financial activities of more than 90% of adult Americans. App. 13a-14a; Virginia G. Maurer and Robert E. Thomas, *Getting Credit Where Credit Is Due: Proposed Changes in the Fair Credit Reporting Act*, 34 Am. Bus. L. J. 607, 610-11 (1997). Using matching programs that they have developed over the years, these companies combine the discrete information received into hundreds of millions of individual records. App. 14a; *see also* ACB, *Who We Are*. Reports summarizing these records are then sold to "subscribers," such as mortgage lenders, credit card companies, prospective employers, and others with a legitimate business interest in the reports. App. 14a. Smaller independent credit reporting agencies also buy, assemble, and sell financial information. ACB, *Who We Are*.

Since 1970, the credit reporting industry has been regulated by the Fair Credit Reporting Act. Among other things, FCRA prohibits individuals from obtaining credit reports without a legitimate business purpose or other purpose enumerated in the Act, *see* 15 U.S.C. §§ 1681b, 1681e(a), and conversely authorizes credit reporting agencies to disclose such reports to private parties only where there is reason to believe that the reports will be used for one of the purposes enumerated by the Act, *see id.* § 1681b(3). The Act also requires credit reporting agencies to follow reasonable procedures to assure the accuracy of their reports. *See id.* § 1681e(b). Finally, FCRA requires both that businesses using credit reports disclose to consumers any adverse actions taken on the basis of such reports, *see id.* § 1681m(a), and that credit reporting agencies disclose the information in its files on a consumer upon that consumer's request, *see id.* § 1681g.

The Act contains detailed remedial provisions. For example, it authorizes consumers to sue for both willful and negligent violations of the Act. *See* 15 U.S.C. §§ 1681n-1681o. FCRA also permits consumers injured by willful violations to recover statutory fines and punitive damages, as well as the compensatory damages available for negligent violations. *See id.* In addition, as mentioned above, Section 618 of the Act requires private claims under the Act to be brought "within two years from the date on which liability arises," except in cases of certain willful misrepresentation. *Id.* § 1681p. Specifically, where a business or credit reporting agency has "materially and willfully misrepresented any information required under [the Act] to be disclosed to an individual" and "the information so misrepresented is material to the . . . . defendant's liability to that individual," Section 618 provides that a claim may be brought within two years "after discovery by the individual of the misrepresentation." *Id.*

2. The respondent in this case is Adelaide Andrews. In the early summer of 1993, she visited a physician in Los Angeles for the first time. App. 16a. During that visit, respondent filled out a new patient form, disclosing personal identifying information such as her full name, birth date, social security number, and California driver's license number. App. 2a, 16a. The receptionist who assisted respondent in completing the form was named *Andrea* Andrews. App. 2a, 16a. The following year, the receptionist moved to Nevada and, using the information respondent had disclosed in the new patient information form, began to impersonate respondent. App. 2a, 16a-17a.

Using respondent's first name, last name, her social security number, and her California driver's license number, the receptionist rented an apartment and obtained utility services. App. 16a. More pertinently, posing as respondent, she also sought to obtain credit. App. 2a, 16a. The receptionist's first attempt was on July 25, 1994, when she applied to First Consumers National Bank for a charge card using respondent's birth date and social security number. App. 2a, 17a. In late October of that year and early January of the next, the receptionist similarly applied for credit to Express Department Stores and to Commercial Credit using respondent's social security number. App. 2a, 17a. On each occasion, the credit provider requested a report from TRW. *Id.* Although the receptionist used her own first name or a derivative of respondent's first name in these applications, TRW determined, as the receptionist hoped, that the application was from respondent based upon its matching algorithm, *see supra* p. 3, and disclosed respondent's credit reports to the credit providers. App. 17a. In each instance, however, the credit providers denied the receptionist's application for credit. App. 3a, 17a-18a.

The receptionist also posed as respondent when she sought cable service on September 27, 1994 and when she sought credit at Dillard's Department store. App. 3a, 16a-17a. Although the cable provider was required as a public utility to provide service to the receptionist, it requested and received respondent's credit report from TRW. App. 3a. Dillard's also requested respondent's credit report, but from Trans Union Corporation, one of TRW's competing national credit reporting agencies, rather than from TRW itself. App. 16a. Unlike the credit providers who received reports from TRW, Dillard's granted the receptionist's application, and, not surprisingly, the receptionist failed to make payments. Respondent claimed that this account adversely affected her credit rating with other credit reporting agencies. App. 18a.

3. Respondent discovered the receptionist's impersonation of her and the problems with her credit ratings in late May 1995 when respondent sought to refinance her home. App. 3a, 18a. To assist her inquiry, respondent's bank ordered a credit report from Chase Credit Service, which assembled a report on her by combining information from TRW, Equifax and Trans Union. App. 3a, 18a. The credit report contained three pieces of derogatory information, two of them accurate and the third dealing with the account the receptionist had opened with Dillard's using respondent's identity. App. 3a, 18a. After becoming aware of the receptionist's activities, respondent contacted TRW to report the identity fraud and to request that the information relating to the Dillard's account be deleted from her records, which TRW promptly did. App. 3a, 18a-19a.

On October 21, 1996, respondent sued both TRW and Trans Union.[2] App. 3a. She alleged that TRW and Trans Union had violated FCRA by disclosing her credit report without a permissible purpose in connection with transactions involving the receptionist. *Id.* Although it is permissible to furnish a consumer's credit report to a credit provider contemplating a credit transaction with the consumer, *see* 15 U.S.C. § 1681b(3), respondent claimed that TRW and Trans Union lacked reasonable grounds for believing that she was the individual involved in the transaction. App. 3a. Respondent also sued TRW and Trans Union for unreasonably including the receptionist's transactions with Dillard's in her credit reports. App. 4a; *see also* App. 1a, 4a (noting companion claims under California law). Claiming that she had suffered "expenditure of time and money and 'commercial impairment, inconvenience, embarrassment, humiliation, and emotional distress, including physical manifestations,'" respondent sought not only compensatory damages, but punitive damages and attorney's fees as well. App. 3a-4a.

4. Prior to trial, Trans Union settled with respondent. TRW, by contrast, moved for summary judgment, and the district court granted partial summary judgment on respondent's improper disclosure claims. App. 11a.

The district court found that any claims based upon the disclosure of credit reports to First Consumers National Bank in July 1994 and the cable provider in September 1994 were barred by FCRA's statute of limitations because those claims were not brought until October 21, 1996, more than two years after the disclosure. App. 22a-25a. In so doing, the district court rejected respondent's claim that the statute of limitations did not begin to run until she discovered the disclosures in May 1995. App. 23a-24a. Following the Ninth Circuit's reasoning in an unpublished decision, *see Allen v. Equifax Credit Information Services, Inc.*, 46 F.3d 1138, 1995 WL 21422 (9th Cir. Jan. 11, 1995) (mem. op.), the trial court held that Section 618's explicit provision for discovery of certain willful misrepresentation claims precluded application of an implicit discovery rule to other claims. App. 24a. The district court entered summary judgment on respondent's remaining disclosure claims on the ground that those disclosures were for a permissible purpose and TRW had followed reasonable procedures in making them. App. 25a-34a; *see also* App. 57a (entering summary judgment on respondent's claims for punitive damages).

The case then went to trial on respondent's remaining claim that TRW unreasonably included the Dillard's transactions in her credit report. Finding TRW's matching procedures reasonable, the jury rendered a verdict in favor of TRW. App. 5a.

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[2] At the time that the complaint was filed, TRW was in the midst of transferring its consumer credit reporting business to Experian. As a consequence, TRW is no longer in the credit reporting business.

5. On appeal, the Ninth Circuit reversed the district court's grant of partial summary judgment on the improper disclosure claims. App. 6a-8a. In addition to finding a genuine issue as to whether TRW had acted reasonably in disclosing respondent's credit reports, the court of appeals held that respondent's claims relating to disclosures prior to October 21, 1994 were not time-barred. App. 5a-6a. Although the court ignored its prior decision in *Allen*, it acknowledged that three other federal courts of appeals had, like the district court, held that Section 618's explicit exception for the discovery of certain willful misrepresentation claims "implied an exclusion of a general discovery rule." App. 6a (citing *Rylewicz v. Beaton Serv., Ltd.*, 888 F.2d 1175 (7th Cir. 1989); *Houghton v. Insurance Crime Prevention Inst.*, 795 F.2d 322 (3d Cir. 1986); *Clay v. Equifax, Inc.*, 762 F.2d 952, 961 (11th Cir. 1985)). Nonetheless, the Ninth Circuit refused to follow the "interpretation by other respected circuit courts of appeals." App. 6a. Instead, it held that Section 618 implicitly incorporates a general discovery rule because the general rule is that "a federal statute of limitations begins to run when a party knows or has reason to know that she was injured," and because, in its view, Congress had not "expressly legislated otherwise." App. 5a, 6a. In so doing, the Ninth Circuit observed that it had followed the same approach in interpreting the Privacy Act, 5 U.S.C. § 552a *et seq*. App. 6a.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S CONSTRUCTION OF THE FAIR CREDIT REPORTING ACT CONTRADICTS THE DECISIONS OF AT LEAST FOUR OTHER COURTS OF APPEALS.

As the Ninth Circuit recognized, its decision below squarely conflicts with decisions of the Third, Seventh, and Eleventh Circuits. The Tenth Circuit has also held that there is no general discovery exception implicit in the Fair Credit Reporting Act's statute of limitations. As a consequence, the decision below creates a four-to-one split among the federal courts of appeals.

Since 1986, the Third Circuit has held that a general discovery rule cannot be implied into the Act's statute of limitations. In *Houghton v. Insurance Crime Prevention Inst.*, 795 F.2d 322 (3d Cir. 1986), the plaintiff claimed that on July 6, 1982 the defendants obtained information concerning him from a consumer credit reporting agency under false pretenses and for an unauthorized purpose. Because the plaintiff did not sue until November 29, 1984, the defendant moved to dismiss based upon the statute of limitations in Section 618 of the Act. Although the plaintiff claimed that he did not discover that the defendants had obtained credit information about him until a month before he sued, the district court found his suit time-barred. *See id.* at 322-23. On appeal, the Third Circuit affirmed. It reasoned that the plaintiff's claims did not fall within Section 618's "precisely defined" discovery exception because the plaintiff did not allege any willful misrepresentation of information required to be disclosed to the plaintiff. *See id.* at 325. Even more importantly, the court of appeals reasoned that a general discovery exception could not be implied into the Act because it would "render[] superfluous the discovery exception which Congress did set forth." *Id.*

Three years after the *Houghton* decision, the Seventh Circuit agreed that a general discovery provision cannot be implied into Section 618. In *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1175 (7th Cir. 1989), an accountant claimed that the defendants had fraudulently and improperly obtained a credit report on him for use in a pending lawsuit. Because the report was obtained in February 1984, the district court dismissed claims against three defendants who were not sued until June 1986. *See id.* at 1181. On appeal, the Seventh Circuit "agree[d] with the Third Circuit that an equitable tolling or discovery exception may not be read into the statute." *Id.* In the Seventh Circuit's view, such an exception could not be implied into Section 618 because "'[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'" *Id.* (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)).

Both the Tenth and the Eleventh Circuits have interpreted Section 618 similarly. The Tenth Circuit did so five years ago in *Clark v. State Farm Fire & Casualty Insurance Co.*, 54 F.3d 669 (10th Cir. 1995). As in *Houghton* and *Rylewicz*, the plaintiffs in *Clark* contended that the defendant had improperly obtained a credit report concerning them. Although the credit report was disclosed more than two years before the plaintiffs' suit was brought, the plaintiffs contended that the statute of limitations did not begin to run until they became aware of the disclosure about six months before the suit was filed. *See id.* at 671. The Tenth Circuit disagreed. *See id.* at 672. Citing both *Houghton* and *Rylewicz*, the court reasoned that a general discovery exception would be "contrary to the exception expressed in the statute." *Id.* In *Clay v. Equifax, Inc.*, 762 F.2d 952 (11th Cir. 1985), the Eleventh Circuit likewise held that, because the plaintiff had failed to allege any willful misrepresentation, Section 618's statute of limitations began to run without regard to when the plaintiff learned of the alleged violation of the Act. *See id.* at 960-61.

By contrast, in the decision below, the Ninth Circuit implied a general discovery exception into Section 618. Here, respondent filed her complaint more than two years after two of the alleged violations, but did not allege any willful misrepresentation of information required to be disclosed to her. App. 23a. In sharp contrast to the other courts of appeals to consider the issue, the Ninth Circuit found that the statute of limitations in Section 618 did not begin to run until respondent discovered petitioner's alleged violations of the Act. App. 6a. Indeed, while the Third, Seventh, and Tenth Circuits reasoned that the Section's limited discovery provision for certain willful misrepresentations barred the implication of any more general discovery rule, the Ninth Circuit found that such a rule must be implied into the Act because Congress had not "expressly legislated otherwise." App. 6a. As the Ninth Circuit acknowledged, this decision squarely conflicts with the decisions of the Third, Seventh and Eleventh Circuits in *Houghton*, *Rylewicz*, and *Clay*, App. 6a, as well as the Tenth Circuit's decision in *Clark*.

II. THE DECISION BELOW CONFLICTS WITH THE PLAIN LANGUAGE OF THE FAIR CREDIT REPORTING ACT.

In interpreting a statute such as FCRA, courts must "look first to its language, giving the words used their ordinary meaning." *Moskal v. United States*, 498 U.S. 103, 108 (1990) (internal quotations and citations omitted). Moreover, "when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 295 (1995) (quotations omitted). Here, the language and the structure of FCRA plainly bar the general discovery rule implied into Section 618 by the decision below.

The statute of limitations provision in Section 618 of the Act does not expressly incorporate a general discovery provision. Instead, it provides that, as a general rule, suits to enforce liabilities created under the Act "may be brought . . . within two years from the date on which liability arises." 15 U.S.C. § 1681p. Moreover, while the statute also contains an exception delaying the running of the statute until discovery, that exception is "precisely defined." *Houghton*, 795 F.2d at 325. It applies only "where a defendant has materially and willfully misrepresented any information required under [the Act] to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this subchapter." 15 U.S.C. § 1681p. Thus, Section 618's discovery exception applies only to willful misrepresentations concerning information that must be disclosed to consumers under the Act.

Under well-settled principles of statutory interpretation, this specific, limited discovery exception bars implication of any more general discovery exception. As the Seventh Circuit observed, *see Rylewicz*, 888 F.2d at 1181, when Congress explicitly carves out an exception to a statute, additional, unenumerated exceptions cannot be implied into the statute unless Congress' intent to do so is clear. *See, e.g., United States v. Smith*, 499 U.S. 160, 166-67 (1991); *Andrus*, 446 U.S. at 616-17; *see generally* 2A Norman J. Singer, *Statutes and Statutory Construction* § 47:23, at 317 (6th ed. 2000) ("The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded."). Moreover, this principle applies with special force here because implying a general discovery exception into Section 618 would render the Section's more limited explicit discovery exception essentially superfluous. As this Court has observed, however, "[s]tatutes must be interpreted, if possible, to give each word some operative effect." *Walters v. Metropolitan Educ. Enter., Inc.*, 519 U.S. 202, 209 (1997), *see also NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy."). Consequently, under well-settled principles of statutory interpretation, a general discovery exception cannot be implied into the statute of limitations in Section 618 of the Act.

This conclusion is supported by the legislative history of Section 618. The original version of this provision passed by the Senate did not contain any discovery exception: it simply stated that suits for violations of the Act must be brought within two years of the violations. *See* S. 823 91st Cong. 1st session (1970). In conference, this provision was amended to include Section 618's limited exception for the discovery of willful misrepresentations concerning required disclosures to consumers. *See* 116 Cong. Rec. 35940 (Oct. 9, 1970) (statement of Sen. Proxmire); 116 Cong. Rec. 36573 (Oct. 13, 1970) (statement of Rep. Sullivan). According to the Conference Report, this amendment was intended to "stop the statute of limitations from running" in the covered cases of willful misrepresentation. H.R. Conf. Rep. 91-1587, at 22 *reprinted in* 1970 U.S.C.C.A.N. 4394, 4416. Obviously, this legislative history cannot be reconciled with the interpretation adopted below because, if Congress had intended Section 618 to incorporate an implicit general discovery rule, the statute of limitations would not have been running.

Even more importantly, the conclusion that Section 618 does not contain an implicit general discovery rule comports with the nature and structure of the Act. Because most of the conduct regulated by the Act involves the conduct of credit reporting agencies and their customers independent of consumers, *see* 15 U.S.C. §§ 1681b-1681f, consumers are not normally immediately aware of violations of the Act. As a consequence, implying a general discovery rule into the Act would not create a special rule for a few unusual cases. Rather, it would lengthen the stated statute of limitations in the vast majority of cases under the Act. As a consequence, a discovery rule would deprive consumer reporting agencies and other defendants of the certainty and repose that the Act's relatively short limitations period promises. *Cf. Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997) (discussing the policies underlying limitations provisions). It makes sense, however, to apply the discovery rule to willful misrepresentations as Section 618 provides because defendants who make such misrepresentations are not deserving of either certainty or repose. Thus, while implication of a general discovery rule undermines Congress' intent, following the plain language of the Act yields a coherent and manageable statutory framework.

Citing two decisions from this Court, the Ninth Circuit reasoned that, "unless Congress has expressly legislated otherwise, the equitable doctrine of discovery 'is read into every federal statute.'" App. 6a (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), and citing *Lampf Pleva, Lipkind, Prupis & Petigrew v. Gilbertson*, 501 U.S. 350, 363 (1991)). Congress has, however, "expressly legislated otherwise" in FCRA's statute of limitations: as demonstrated above, the text, structure, and legislative history of the statute all make it clear that Congress did not intend Section 618 to incorporate a general discovery rule. Furthermore, there is no basis for the clear statement rule applied by the decision below. The decisions cited by the Ninth Circuit deal with implied statutes of limitations where Congress was silent on the issue of limitations, not with a provision expressly enacted by Congress. *See Lampf*, 501 U.S. at 358-59 (considering limitations period for implied cause of action); *Holmberg*, 327 U.S. at 584 (considering statute silent on limitations period). Where Congress has enacted a specific statute of limitations with a discovery or tolling provision built in — which it can and frequently does[3] — the question is simply one of congressional intent. *See, e.g.*, *United States v. Beggerly*, 524 U.S. 38, 48 (1998) ("Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute."); *see also United States v. Brockamp*, 519 U.S. 347, 350 (1997) (refusing to apply equitable tolling doctrine to statute that "sets forth its limitations in a highly detailed technical manner").

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[3] *See, e.g.*, 5 U.S.C. § 552a(g)(5) (providing that certain actions "may be brought at any time within two years after the discovery by the individual of the misrepresentation"); 19 U.S.C. § 1621 (requiring certain actions to be brought "within five years after the time when the alleged offense was discovered, or . . . within 2 years after the time when [an element of the offense] was discovered, [or] within 5 years after the date of discovery of fraud"); 42 U.S.C. § 9613(g) (providing that certain actions may be brought "within 3 years after . . . [t]he date of the discovery of the loss and its connection with the release in question").

III. THIS CASE PRESENTS AN IMPORTANT AND RECURRING QUESTION THAT SHOULD BE RESOLVED BY THIS COURT.

The question presented by this case touches upon issues of increasing importance. In the last several years, in part due to the development of the Internet, the public has become more and more concerned about personal privacy. *See, e.g.*, David Brin, *The Transparent Society* (1998).[4] It should come as no surprise then that more and more FCRA suits are being brought and that questions concerning whether the discovery rule permits suits based upon conduct outside the Act's two year limitations period are frequently raised.[5]

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[4] *See also* American Civil Liberties Union Freedom Network, *Defend Your Data: What They Do Know Can Hurt You*, *available at* http://www.aclu.org/privacy (visited December 15, 2000); Electronic Privacy Information Center, *EPIC Online Guide to Privacy Resources* (May 16, 2000) *at* http://www.epic.org/privacy/privacy_resources_faq.html (visited December 15, 2000); Privacy Rights Clearinghouse *available at* http://www.privacyrights.org (offering online information and links to related resources) (visited December 15, 2000); Privacy Exchange.org *at* http://privacyexchange.org (same) (visited December 15, 2000); PrivacyTimes.org *at* http://www.privacytimes.com (visited December 15, 2000) (an online newspaper addressing privacy issues); The Privacy Forum *available at* http://www.vortex.com/privacy (visited December 15, 2000); and PrivacyPlace Online Magazine *at* http://www.privacyplace.com/home.php (visited December 15, 2000). The specific issue of identity theft is, of course, related to privacy, and, surprisingly, in recent years, it has also attracted public attention and action. *See, e.g.*, Identity Theft and Assumption Deterrence Act of 1998, 18 U.S.C. § 1001 *et seq.*; Identity Theft Prevention Act of 2000, H.R. 106-4311 (2000); Prepared Statement of the Federal Trade Commission on Identity Theft *before the* Committee on Banking and Financial Services United States House of Representatives (Sept. 13, 2000) *available at* http://www.ftc.gov/os/2000/09/idthefttest.htm (visited December 18, 2000).

[5] In fact, in addition to the opinions discussed earlier, *see supra* pp. 8-11, close to a dozen decisions in the last seven years have addressed this issue.

In addition, the decision below will have far-reaching effects on the credit reporting industry. If that decision is allowed to stand and credit reporting agencies lose the intended protection of Section 618's strict two-year statute of limitations, those agencies will be forced to adjust their file retention policies in order to defend against suits based upon events that occurred more than two years before the suit was filed.[6] In most industries, the burden of doing so would be manageable. The credit reporting industry is, however, a recordkeeping industry. The three national credit reporting bureaus alone assemble and maintain credit records on hundreds of millions of individuals. *See* App. 13a-14a; *see also* Associated Credit Bureaus, Inc., *Who We Are*, *available at* http://acb.cyberserv.com/qs/Qspage.cfm?pageid=50 (visited December 19, 2000). As a consequence, any rule that requires them to retain records for longer periods of time will impose an enormous burden on them. *Cf. Brockamp*, 519 U.S. at 352-53 (refusing to read an equitable tolling exception into an Internal Revenue Code statute of limitations because doing so "could create serious administrative problems" in light of the nature and potential magnitude of the underlying subject matter). Moreover, because the major credit reporting bureaus maintain unified national files, the decision of the Ninth Circuit in this case will effectively dictate their nationwide practices.

Finally, this case presents a good vehicle for instructing the lower courts on the applicability of the discovery rule to federal statutes of limitations. The decision below adopted a sweeping rationale — that the discovery rule is incorporated into federal statutes of limitations absent a clear statement otherwise (App. 6a) — that applies far beyond FCRA. Indeed, the Ninth Circuit derived this rationale from a case construing the Privacy Act. *Id.* Although the decisions of this Court are instructive on this issue, *see, e.g., Beggerly*, 524 U.S. at 48; *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), as the decision below demonstrates, the lower courts are still in need of guidance. Accordingly, for this reason as well, the question presented warrants review by this Court.

See Lazar v. Trans Union LLC, 195 F.R.D. 665, 669-71 (C.D. Cal. 2000); *Gill v. Kostroff*, No. 98-930-CIV-T-17A, 2000 WL 141258, at *3-6 (M.D. Fla. Feb. 8, 2000); *McAnly v. Middleton & Reutlinger, P.S.C.*, 77 F. Supp. 2d 810, 812-14 (W.D. Ky. 1999); *McNamara v. Guazzoni*, No. 98 CIV 4085(HB), 1999 WL 322648, at *4 (S.D.N.Y. May 20, 1999); *Ben-Hur v. Equifax Info. Serv., Inc.*, 976 F. Supp. 795, 801-02 (E.D. Wis. 1997); *Way v. Barr*, No. HAR 94-2519, 1995 WL 307525, at *2 (D. Md. May 15, 1995); *Edgar v. Reich*, 881 F. Supp. 83, 84-87 (D. Mass. 1995); *Wilson v. Porter, Wright, Morris & Arthur*, 921 F. Supp. 758, 759-61 (S.D. Fla. 1995); *Management Info. Technologies, Inc. v. Alyeska Pipeline Serv. Co.*, No. 92-1730, 1993 WL 219257, at *4-6 (D.D.C. June 8, 1993); and *Batchelor v. First Nat'l Bank of Blue Island*, No. 92 C 5073, 1993 WL 22859, at *3 (N.D. Ill. Jan. 20, 1993).

[6] *See, e.g.*, Federal Trade Commission Fair Credit Reporting Act Staff Opinion Letter to Stephen Kilgo, July 28, 1998, at 1 *available at* http://www.ftc.gov/os/statutes/fcra/kilgo.htm (visited December 18, 2000) (recommending that documents concerning compliance with the Act be retained for at least the limitations period).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 22, 2000

APPENDIX

225 F.3d 1063

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Adelaide ANDREWS, Plaintiff-Appellant,

v.

TRW INC., Defendant-Appellee.

No. 98-56624

Argued and Submitted April 3, 2000

Filed July 17, 2000

As Amended Oct. 4, 2000

Appeal from the United States District Court for the Central District of California; Lourdes G. Baird, District Judge, Presiding. D.C. No. CV-96- 07369-LGB.

Before: CANBY, NOONAN, and W. FLETCHER, Circuit Judges.

NOONAN, Circuit Judge:

Adelaide Andrews (Andrews) appeals the judgment by the district court in her suit against TRW, Inc. The case involves the rights under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681u (1994 & Supp. II) (FCRA), and Cal. Bus. & Prof. Code § 17200 *et. seq.* (1996), of a person claiming to be damaged by the disclosure of inaccurate credit information by a consumer credit reporting agency such as TRW.

We hold that Andrews's suit was not barred by § 1681p. We further hold that it was not a question of law but a question to be resolved by the jury as to whether TRW had reason to believe that it was furnishing information in connection with a consumer transaction involving Andrews. For these reasons we reverse the partial summary judgments awarded TRW on the first of Andrews's claims. As to the claims that did go to trial and ended in judgment against her after trial, we find no harmful error and affirm.

FACTS

In June 1993, Andrea Andrews (hereafter the Imposter) obtained the social security number and California driver's license number of Adelaide Andrews (hereafter the Plaintiff). The Imposter did so simply by misusing her position as a doctor's receptionist and copying the information that the Plaintiff, as a patient in that office, supplied to the doctor.

In 1994-1995 the Imposter applied for credit to four companies subscribing to TRW's credit reports. For example, on July 25, 1994, to First Consumers National Bank (FCNB), the Imposter applied as Andrea A. Andrews, 3993-1/2 Harvard Blvd., Los Angeles, CA, 90062, phone 213-312-0605, employed at Spensor Robbyns Products, Los Angeles. The Imposter gave the birth date and social security number of the Plaintiff.

In this application the only misinformation was the Imposter's use of the Plaintiff's social security number and date of birth. On October 28, 1994 to Express Department Stores the Imposter made a comparable credit application, using her own identity except for the Plaintiff's social security number. Again, in January 1995, to Commercial Credit the Imposter applied for credit, using her own identity, except for Plaintiff's social security number and a clumsy misspelling of her first name as "Adeliade."

TRW responded to the credit inquiries of the three companies by treating the applications as made by the Plaintiff. TRW furnished the information in its file on the Plaintiff and added the three inquiries to the Plaintiff's file.

Each of the credit applications applied for by the Imposter was turned down by the company getting the TRW report. In addition, the Imposter applied for cable service to a public utility, Prime Cable of Las Vegas, which was required by law to provide cable services but nonetheless asked for a TRW report. The Imposter applied as Andrea Andrews, 4201 S. Decatur # 2202, Las Vegas, NV, 89103, Phone 248-6352. The Imposter used the social security number of the Plaintiff, which was the only stolen item of identity provided. This account became delinquent and was referred to a collection agency.

The Plaintiff, however, became aware of the Imposter only on May 31, 1995 when she sought to refinance the mortgage on her home. The bank from which the financing was sought received a report from Chase Credit Research, not a party to this case, whose report combined information from TRW and two other credit reporting agencies. Now aware of the fraud, Andrews contacted TRW and requested deletion from her file of all reference to the Imposter's fraudulent activities. TRW complied.

PROCEEDINGS

On October 21, 1996, the Plaintiff filed this suit in the district court. In her first claim she alleged that TRW had furnished credit reports without "reasonable grounds for believing" that she was the consumer whom the credit applications involved, contrary to 15 U.S.C. §§ 1681b and 1681e(a), and that as a consequence she had suffered damages including an expenditure of time and money and "commercial impairment, inconvenience, embarrassment, humiliation, and emotional distress including physical manifestations." In her second claim, she alleged that TRW had violated § 1681e by not maintaining the "reasonable procedures" required by that statute in order "to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b). She alleged the same damages. She asserted that both violations were willful and that both also violated Cal. Bus. & Prof. Code § 17200 *et. seq.* She sought actual and punitive damages and an injunction requiring TRW to comply with the Fair Credit Reporting Act by "requiring a sufficient number of corresponding points of reference" before disseminating an individual's credit history or attributing information to an individual's credit file.

On May 28, 1998, the district court granted partial summary judgment to TRW. The court held that the two year statute of limitations provided by § 1681p began to run at the time the alleged wrongful disclosures of credit information were made to the requesting companies. By this test the complaint was too late as to the disclosures made to FCNB and to Prime Cable. As to the disclosures made to Express and Commercial, the court ruled that they were made for a purpose permissible under § 1681b(a)(3)(A), because the Plaintiff, even against her will, was "involved" in the credit transaction initiated by the Imposter. Any other rule, the court said, would place "too heavy a burden on credit reporting agencies." In addition, the court ruled that TRW had used the "reasonable procedures" required by § 1681e(a) to limit disclosures to permissible purposes. For these several reasons, the court granted summary judgment to TRW on the Plaintiff's first claim.

The court also struck Plaintiff's claim for punitive damages on both her first and second causes of action. The court ruled that the Plaintiff had produced no evidence of TRW's conscious disregard of reasonable procedures. In so ruling, the court did not consider the testimony of Dr. Douglas Stott Parker, the Plaintiff's expert on computers or the testimony of Evan Hendricks, the Plaintiff's expert on the prevalence of identity theft.

TRW then moved in limine to bar from testifying at trial the Plaintiff's witness Douglas Stott Parker, offered as an expert on the Plaintiff's second claim that TRW's procedures were not reasonable in assuring maximum possible accuracy. Relying in part on its earlier rulings, the district court ordered that Parker not testify as to procedures leading to inaccuracy in TRW disclosing the Plaintiff's information upon the Impostor's applications.

The case proceeded to trial on the Plaintiff's second and third claims. The jury returned a verdict for TRW. The Plaintiff appeals the consequent judgment on all her claims.

ANALYSIS

The Statute of Limitations. Liability under the statute arises when a consumer reporting agency fails to comply with § 1681e. *Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329 (9th Cir.1995). The question is presented whether Andrews's claims are barred as to those alleged failures to comply which occurred before October 21, 1994. 15 U.S.C. § 1681p reads:

> An action to enforce any liability created under this title may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises, except that where a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this title, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

The general federal rule is that a federal statute of limitations begins to run when a party knows or has reason to know that she was injured. *Norman-Bloodsaw v. Lawrence Berkeley*

Lab., 135 F.3d 1260, 1266 (9th Cir.1998). By this test none of the Plaintiff's injuries were stale when suit was brought.

The district court relied on what it saw as the implication of the statute explicitly referencing a discovery time limit where a defendant had wilfully misrepresented information "required to be disclosed to an individual." The creation of this exception, the court reasoned, implied an exclusion of a general discovery rule. *Accord*, *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1175 (7th Cir.1989); *Houghton v. Insurance Crime Prevention Inst.*, 795 F.2d 322 (3d Cir.1986); *Clay v. Equifax, Inc.*, 762 F.2d 952, 961 (11th Cir.1985). It is argued, to the contrary, that neither the language of the statute nor its interpretation by other respected circuit courts of appeals is a warrant for disregarding the teaching of the Supreme Court: unless Congress has expressly legislated otherwise, the equitable doctrine of discovery "is read into every federal statute of limitations." *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *see also Lampf v. Gilbertson*, 501 U.S. 350, 363 (1991). We have followed this approach in interpreting an analogous statute. *See Englerius v. Veterans Admin.*, 837 F.2d 895, 898 (9th Cir.1988). We are not persuaded to depart from the general rule or the analogy. Andrews's claims were not barred.

Disclosure Without Reasonable Belief. Under § 1681b TRW could only furnish a report on a consumer to a customer which it had "reason to believe" intended to use the information in connection with "a credit transaction involving the consumer on whom the information is to be furnished." 15 U.S.C. § 1681b(a)(3). Did TRW have a reasonable belief that the Plaintiff was the consumer involved in the credit transactions as to which the four companies sought a report from TRW? As the district court observed, there are 250,000,000 persons in the United States (not all of them having Social Security numbers) and 1,000,000,000 possibilities as to what any one Social Security number may be.

The random chance of anyone matching a name to a number is very small. If TRW could assume that only such chance matching would occur, it was reasonable as a matter of law in releasing the Plaintiff's file when an application matched her last name and the number. But we do not live in a world in which such matches are made only by chance.

We take judicial notice that in many ways persons are required to make their social security numbers available so that they are no longer private or confidential but open to scrutiny and copying. Not least of these ways is on applications for credit, as TRW had reason to know. In a world where names are disseminated with the numbers attached and dishonest persons exist, the matching of a name to a number is not a random matter. It is quintessentially a job for a jury to decide whether identity theft has been common enough for it to be reasonable for a credit reporting agency to disclose credit information merely because a last name matches a social security number on file.

In making that determination the jury would be helped by expert opinion on the prevalence of identity theft, as the district court would have been helped if it had given consideration to the Plaintiff's witnesses on this point before giving summary judgment.

The reasonableness of TRW's responses should also have been assessed by a jury with reference to the information TRW had indicating that the Imposter was not the Plaintiff. TRW argues that people do use nicknames and change addresses. But how many people misspell their first name? How many people mistake their date of birth? No rule of law answers these questions. A jury will have to say how reasonable a belief is that let a social security number trump all evidence of dissimilarity between the Plaintiff and the Imposter.

The district court held that the Plaintiff was involved in the transaction because her number was used. The statutory phrase is "a credit transaction involving the consumer." 15 U.S.C. § 1681b(a)(3)(A). "Involve" has two dictionary meanings that are relevant: (1) "to draw in as a participant" or (2) "to oblige to become associated." The district court understood the word in the second sense. We are reluctant to conclude that Congress meant to harness any consumer to any transaction where any crook chose to use his or her number. The first meaning of the statutory term must be preferred here. In that sense the Plaintiff was not involved.

Another consideration for the district court was that a different rule would impose too heavy a cost on TRW. The statute, however, has already made the determination as to what is a bearable cost for a credit reporting agency. The cost is what it takes to have a reasonable belief. In this case that belief needed determination by a jury not a judge.

We reinstate the Plaintiff's first claim together with her request for punitive damages based upon it.

Reasonable Procedures To Assure Accuracy. The statutory command is clear: "Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C § 1681e(b). It would normally not be easy for a court as a matter of law to determine whether a given procedure was reasonable in reaching the very high standard set by the statute as to each individual reported upon. "The reasonableness of the procedures and whether the agency followed them will be jury questions in the overwhelming majority of cases." *Guimond*, 45 F.3d at 1333. The expert testimony to be offered by Dr. Parker on "automated procedures for connecting and resolving inaccuracies in credit reports" was germane to a jury determination of this question.

The district court ruled that it was already the law of the case, as a result of its summary judgment rulings, that it was

permissible for TRW to disclose the Plaintiff's file after an application by the Imposter. In ruling on what Dr. Parker could testify to, the district court expanded that ruling to include the permissibility of TRW disclosing the Imposter's file when the Plaintiff applied for credit. On the basis of this expanded position, the district court ruled that Dr. Parker could not testify as to the availability of computer software that could have kept the Imposter's data and the Plaintiff's data from being merged in a TRW report. As we have already held, it was not a question of law for the court to decide whether TRW had a reasonable belief permitting disclosure. The court's legal error infected its ruling on the scope of Dr. Parker's testimony.

Despite its in limine ruling, the district court permitted Andrews to examine Dr. Parker on the basis of a TRW report to Strategic Mortgage Services made on June 5, 1995. This report attributed to the Plaintiff the Dillard's account opened by the Imposter. Dr. Parker testified that TRW could have had in place "an integrity restraint" that would have prevented this error. He described an integrity restraint as a watchdog that would have looked for problems or anomalies of the kind that TRW failed to detect with the result that the Imposter's applications to FCNB, Express, and Commercial Credit, and her Prime Cable connection were attributed to the Plaintiff. Dr. Parker testified that such integrity restraints were available in the relevant period, 1994-1996. In the light of this testimony it is difficult to conclude that the Plaintiff was harmed at trial by the court's initial ruling.

Conclusion: Judgment on Plaintiff's first cause of action and the state law claim is REVERSED and the case is REMANDED for trial. Judgment on Plaintiff's second cause of action is AFFIRMED. Each party should bear its own costs.

7 F. Supp. 2d 1056

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA.

Adelaide ANDREWS, Plaintiff,

v.

TRANS UNION CORP. et al., Defendants.

No. CV 96-7369 LGB VAPX.

May 27, 1998.

ORDER GRANTING IN PART AND DENYING IN PART TRANS UNION'S MOTION FOR SUMMARY JUDGMENT AND GRANTING TRW'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

BAIRD, District Judge.

I. Introduction

Plaintiff Adelaide Andrews has sued Defendants, two credit reporting agencies, over the way they handled her credit information. Each Defendant filed a separate Motion for Summary Judgment or Partial Summary Judgment. These Motions came on regularly for hearing on May 18, 1998. Having reviewed all pertinent papers on file and considered the oral argument of counsel, for the reasons discussed below, the Court will rule as follows:

Defendant Trans Union's Motion for Summary Judgment is GRANTED in part and DENIED in part as follows: Defendant Trans Union's Motion on Plaintiff's improper disclosure (§ 1681e(a)) claim is GRANTED. Defendant Trans Union's Motion on Plaintiff's accuracy (§ 1681e(b)) claim, reinvestigation (§ 1681i(a)) claim, state law (§ 17200) claim, request for punitive damages, and request for injunctive relief is DENIED.

Defendant TRW's Motion for Partial Summary Judgment is GRANTED in all respects, including Plaintiff's improper disclosure (§ 1681e(a)) claim, request for punitive damages, and request for injunctive relief. Additionally, Defendant TRW's Motion for Summary Adjudication that Plaintiff did not incur any economic damages in the form of higher interest expenses relating to TRW's furnishing her credit report to Chase is likewise GRANTED.

II. Procedural Background

Plaintiff Adelaide Andrews ("Plaintiff") filed this Complaint against Trans Union Corporation, Inc. and TRW, Inc. ("Defendants") on October 21, 1996 alleging four causes of action for violation of the Fair Credit Reporting Act ("FCRA"), as amended, 15 U.S.C. §§ 1681 *et seq.*, and state law:

(1) Both Defendants wrongfully disclosed Plaintiff's consumer reports in violation of 15 U.S.C. §§ 1681b and 1681e(a);

(2) Both Defendants failed to employ reasonable procedures to assure maximum possible accuracy of Plaintiff's consumer reports in violation of 15 U.S.C. § 1681e(b);

(3) Defendant Trans Union failed to reasonably reinvestigate and promptly delete misinformation in Plaintiff's consumer reports in violation of 15 U.S.C. § 1681i(a);

(4) Both Defendants, by the acts and omissions entailed in the above federal allegations, have also violated California Business and Professions Code §§ 17200, *et seq.*

Plaintiff seeks injunctive and declaratory relief, actual and punitive damages in amounts to be determined at trial, disgorgement of any profits resulting from the state law violation, and attorneys' fees and costs.

Plaintiff alleges that when she sought a residential mortgage on or about May 31, 1995, the bank indicated delinquent information existed in Plaintiff's credit report. Plaintiff alleges that this negative information was a result of identity fraud because, although the social security number, last name, and first initial were hers, the other information (first name, date of birth, and address) belonged to an imposter.

Accordingly, Plaintiff alleges that both Defendants, credit reporting companies, violated their duties under the Fair Credit Reporting Act, 15 U.S.C §§ 1681, *et seq.*, by releasing her credit report without sufficient identification, thereby allowing the imposter to open the fraudulent accounts, and by not promptly rectifying the misinformation after Plaintiff advised them of the dispute and investigation.

Although Defendants both subsequently removed the delinquent misinformation, Trans Union retained the inquiries on Plaintiff's consumer report. Further, Plaintiff alleges sustained distress, commercial impairment, and loss of time and money. Plaintiff also alleges that the emotional distress caused a flare-up of her preexisting Lupus condition.

Plaintiff filed her complaint in this court on October 21, 1996. On October 20, 1997, this Court denied Defendant Trans Union's Motion for Leave to File Third-Party Complaint, which sought to implead the imposter as a third-party defendant. The Court held that Defendant Trans Union had no right of contribution or indemnity against the alleged imposter, and thus, impleader was improper.

On March 24, 1998, Defendant Trans Union filed a Motion for Leave to File an Amended Answer. Since this Motion was noticed to be heard after the Motions Cut-Off date, it also sought to amend the scheduling order. By Order filed on April 15, 1998, The Court granted this Motion.

On February 23, 1998, each Defendant filed their own Motion for Summary Judgment or Partial Summary Judgment. On March 2, 1998, Plaintiff filed her Oppositions. On March 9, 1998, Defendants filed their Replies. A hearing was held on May 18, 1998.[1]

III. Detailed Factual Background

The following facts are undisputed, at least for the purposes of these Motions, unless otherwise noted:[2]

A. How the Consumer Reporting Agencies Operate and are Regulated

Defendants were both consumer reporting agencies governed by the FCRA during the time period relevant to this case.[3] (Pl.'s Stmt. Genuine Issues in Opp. to Trans Union's Mot. [hereinafter TU Genuine Issues] ¶ 1; TRW Genuine Issues ¶ 1.) Each Defendant maintained a computer system which stored credit information about hundreds of millions of consumers--Trans Union's system is named CRONUS and TRW's system was named the Legacy System. (TU Genuine Issues ¶ 7; TRW's Reply to Genuine Issues ¶ 3.)

Defendants' computers have two main functions. The first is to receive information from large creditors, such as department stores, credit card issuers, banks, etc. This information consists of things like repayment history, credit limits, balances, etc., on individual consumers. Thus, Defendants' computers are repositories of huge amounts of consumer credit information. (*See generally*, TRW's Reply to Genuine Issues ¶ 3; TU Genuine Issues ¶ 7 at 3, ¶ 2 at 25.)

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[1] The Court takes this opportunity to note the uniformly high quality of the legal work performed by all parties on these Motions.

[2] Plaintiff's objection to the Bayer Affidavit and TRW's objections to the Hendricks Declaration need not be decided, as the Court did not consider this evidence for purposes of this Order. TRW's objections to the Parker Declaration are addressed below.

[3] As of September 19, 1996, TRW is no longer a consumer reporting agency, having sold its consumer reporting business. (Pl.'s Stmt. Genuine Issues in Opp. to TRW's Mot. [hereinafter TRW Genuine Issues] ¶ 2.)

The second function of Defendants' computers is the key to this case. Their computers allow Defendants' "subscribers" to access the data in real-time for various purposes, such as to facilitate credit transactions. For example, when a subscribing credit grantor is contemplating extending credit to a consumer, the credit grantor obtains a report from Defendants describing the consumer's past use of credit. Based on the contents of that report, the credit grantor can make an informed decision whether to grant or deny credit. Defendants' computers are programmed to analyze a subscriber's request for a report and compare the identifying information (i.e., the name, address, social security number, etc.) with the data in the computer. Based on a proprietary scheme, Defendants' computers release information that is "sufficiently" similar to the identifying information in the request. In other words, a subscriber's request for a report on Steve Smith may return information listed under Steve Smith, Steven Smith, S. Smith, etc., depending on how closely the other identifying information matches. In the instant case, as will be described in more detail below, both Defendants' computers released Plaintiff's information based on an exact match of her social security number, last name, and first initial.

Consumer reporting agencies are regulated by the FCRA, 15 U.S.C. § 1681 *et seq.* The FCRA imposes a number of specific requirements on consumer reporting agencies, several of which Plaintiff alleges that Defendants violated. These will be discussed in detail below.

In enacting the FCRA, Congress made several findings, and enunciated a statement of purpose. These are as follows:

> The Congress makes the following findings:

> (1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system . . .
>
> (2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.
>
> (3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.
>
> (4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.
>
> It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

15 U.S.C. § 1681. Having described the general functioning of consumer reporting agencies such as Defendants and the purpose of the FCRA, the Court next turns to a description of the relevant transactions in this case.

B. Plaintiff and the Imposter

There is little dispute about the underlying factual events which transpired in this case. The differences between the parties are in their interpretation of the legal effect of those events.

Plaintiff's name is Adelaide Andrews. At the relevant time period she lived in Santa Monica, CA. On June 17, 1993, Plaintiff went to a radiological medical office in Santa Monica, Lebovic, Schwimer & Goldberg, for a procedure. (Lussier Decl. Ex. F (Andrews Depo.) at 5; Ex. G (Lebovic Depo.) at 14.) This visit was her first to Lebovic. (Lussier Decl. Ex. G at 14.) Plaintiff completed a "Patient Information" form, listing her name, birthdate, home address, home phone number, driver's license number, and employment. (*Id.* at 52 (copy of the form).) After Plaintiff completed this form, she handed it to Lubovic's receptionist--one Andrea Andrews (the "Imposter"). (*Id.* at 18.) The Imposter had complete access to this form and the information contained thereon. It is undisputed that this is the way the Imposter received the identifying information about Plaintiff--from Plaintiff herself, not from Defendants. (TU Genuine Issues ¶ 5; TRW Genuine Issues ¶ 12.)

The Imposter subsequently moved to Las Vegas, and began impersonating Plaintiff. On August 5, 1994, the Imposter entered into an apartment lease at 4201 South Decatur Blvd. in Las Vegas, using the name "Adelaide (Andrea) Andrews" as well as Plaintiff's social security number and driver's license number. (Lussier Decl. Ex. H (copy of lease).) The Imposter also obtained telephone and electric service, apparently in Plaintiff's name. Apparently no credit reports were obtained for these three transactions.

In addition to these transactions, the Imposter made five other attempts to obtain credit using Plaintiff's identity. It is these five attempts that form the bulk of Plaintiff's suit. One of these attempts involved Trans Union--On October 22, 1994, the Imposter applied for credit at Dillard's, a department store in Las Vegas. (TU Genuine Issues ¶ 20.) Dillard's furnished to Trans Union the name "Andrea Andrews," her Las Vegas Address, and Plaintiff's social security number. (*Id.*) At that time, Trans Union had a file on Andrea Andrews with the Las Vegas Address and no social security number. (*Id.* ¶ 21.) Trans Union also had two files on Plaintiff, both under the name "Adelaide E. Andrews" with Plaintiff's social security number. (*Id.* ¶ 22.) One of these listed Plaintiff's Santa Monica Address, and one listed a Texas address, apparently a former address of Plaintiff. (*Id.*) Trans Union passed all three files on to Dillard's. Plaintiff's files were passed on because of the exact match on the social security number, last name, and first initial. (*Id.* ¶ 23.) Plaintiff's files carried a "Trans Alert" warning to Dillard's that the addresses in Trans Union's file did not match the address supplied by Dillard's. (*Id.* ¶ 24.) The Imposter's file was passed on because of the match on the name and address. (*Id.* ¶ 26.) After receiving the reports, Dillard's granted the Imposter credit; this account later went delinquent.

The Imposter's other four attempts to gain credit involved TRW credit reports. On July 25, 1994, TRW provided a credit report to FCNB Preferred Charge. (TRW Genuine Issues ¶ 4.) On September 27, 1994, TRW provided a credit report to Prime Cable of Las Vegas. (*Id.* ¶ 5.) On October 28, 1994, TRW provided a credit report to Express. (*Id.* ¶ 13.) Finally, on January 3, 1995, TRW provided a credit report to Commercial Credit. (*Id.* 15.) As with Trans Union's Dillard's report, Plaintiff's credit report was provided because the Imposter used Plaintiff's exact social security number, last name, and first initial, although different addresses, birth dates, etc. (Lussier Decl. Ex. J (FCNB requested report on "Andrea A. Andrews" with Plaintiff's social security number); Ex. K (Express requested report on "Andrea Andrews" with Plaintiff's social security number); Ex. L (Commercial requested report on "Adelia de Andrews" with Plaintiff's social security number).) It is undisputed that the Imposter's credit applications to FCNB, Express, and Commercial Credit were all denied. (*See* Lussier Decl. Ex. M (Pl.'s 2d. Supp. Resp. to Interrog.); TRW Genuine Issues ¶¶ 14, 17.)[4]

C. Plaintiff's Discovery of the Imposter's Activities

On May 31, 1995, Plaintiff went to the Santa Monica office of Home Savings of America to inquire about refinancing the mortgage on her home. (Lussier Decl. Ex. F (Andrews Depo.) at 104-05.) In connection with this inquiry, Home Savings obtained a credit report on Plaintiff from Chase Credit Research, a nonparty credit reporting agency. (TU Genuine Issues ¶ 28.) Chase prepared this credit report by obtaining credit reports on Plaintiff from Defendants Trans Union and TRW, and non-party credit reporting agency Equifax. (*Id.* ¶ 29.) Chase combined the information from these three individual credit reports into a composite report which it furnished to Home Savings. (*Id.* ¶¶ 29-30.)

The Chase report listed the Imposter's Dillard's account as being delinquent. (Cohan Depo. Ex. 151 (the Chase Report) at 3.) This information was attributed to Trans Union and/or TRW. (*Id.* (noted on the Chase report as "TRW/TU").) After seeing this derogatory information on the Chase report, Plaintiff did not apply for the loan with Home Savings, allegedly believing that it would not be approved. Instead, she obtained a second trust deed equity line with Merrill Lynch, allegedly at a higher interest rate.

D. Defendants' Response to the Plaintiff's Problem

After becoming aware of the problems caused by the Imposter, Plaintiff contacted both Defendants to resolve the problems. Plaintiff does not allege any claim against TRW for an inadequate reinvestigation of her credit file. Plaintiff's inadequate reinvestigation claim is asserted only against Trans Union. (Complaint at 9.)

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[4] Although Prime Cable opened an account in Plaintiff's name, there is a dispute as to whether "credit" was granted; however, as discussed below, the Court need not resolve this dispute.

Plaintiff first contacted Trans Union regarding the problems on June 5, 1995. (TU Genuine Issues ¶ 35.) On that same day, Trans Union placed a "fraud notice" on Plaintiff's credit report, stating: "FRAUD VICTIM; DO NOT EXTEND CREDIT WITHOUT FIRST CONTACTING ME PERSONALLY AND VERIFYING ALL APPLICANT INFORMATION." (*Id.* ¶ 41.) On or about June 22, 1995, Trans Union contacted Dillard's and determined that the Dillard's account was obtained fraudulently and did not belong to Plaintiff. (*Id.* ¶ 51.) On or about June 22, 1995, Trans Union manually suppressed the Dillard's delinquency from being disclosed in response to inquiries about Plaintiff. (*Id.* ¶ 52.) However, Plaintiff's credit report continued to show an "inquiry" by Dillard's, indicating that Plaintiff's credit report had been disclosed to Dillard's on October 22, 1994 (the day the Imposter applied for credit). (*Id.* ¶ 54.)

IV. Standard for Summary Judgment

Summary judgment must be entered against a party who, after adequate time for discovery and upon motion, fails to make a showing sufficient to establish an element essential to that party's case, and on which that party would bear the burden of proof at trial. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A party moving for summary judgment may carry its initial burden by pointing out to the district court that there is an absence of a genuine issue of material fact. *Id.* at 323.

To avoid summary judgment, the non-movant must set forth specific facts showing that there remains a genuine issue of material fact for trial. *Id.* at 324. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in the non-movant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). If the non-moving party's evidence is merely colorable or is not significantly probative, then summary judgment may be granted. *Id.* at 249-50.

V. Analysis

As described above, Plaintiff's Complaint asserts four causes of action: 1) improper disclosure of her credit report; 2) inadequate procedures for assuring "maximum possible accuracy" of her credit file; 3) improper reinvestigation of her file by Defendant Trans Union only; and 4) violation of California's Unfair Trade Practices Act.

Defendants have each separately moved for summary judgment or partial summary judgment on various aspects of Plaintiff's Complaint: Both Defendants move for summary judgment on Plaintiff's "improper disclosure" count. Only Defendant Trans Union moves for summary judgment on Plaintiff's "accuracy" count; TRW chose not to so move. Trans Union is the only defendant against whom the "reinvestigation" count is alleged, and Trans Union moves for summary judgment on this count. Defendant TRW moved for summary adjudication that Plaintiff did not incur any economic damages in the form of higher interest expenses relating to TRW's furnishing her credit report to Chase. Only Trans Union moved for summary judgment on Plaintiff's state law claim. Both Defendants moved for summary adjudication on Plaintiff's request for punitive damages. Both Defendants also moved for summary adjudication on Plaintiff's request for injunctive relief, although for different reasons. These issues will each be addressed in turn.

A. Plaintiff's "Improper Disclosure" Claim

This claim is made under 15 U.S.C. § 1681e(a), which provided[5] that:

> Every consumer reporting agency shall maintain reasonable procedures designed to ... limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

15 U.S.C. § 1681e(a). The permissible purposes for which a consumer reporting agency may furnish reports are enumerated in section 1681b of the FCRA, as follows:

> A consumer reporting agency may furnish a consumer report under the following circumstances and no other:
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> . . . .
>
> (3) To a person which it has reason to believe—
>
> (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of

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[5] The FCRA was extensively amended in 1996, with an effective date for the amendments of September 1997. Because all of the events in this case took place before that time, the old version of the FCRA is applicable. Accordingly, all statutory references in this Order are to the pre-1996 Amendment version of the FCRA.

> credit to, or review or collection of an account of, the consumer; or
>
> (E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

15 U.S.C. § 1681b.

Plaintiff's improper disclosure claim is asserted against Trans Union based on its furnishing Plaintiff's report to Dillard's, and against TRW based on its furnishing Plaintiff's report to FCNB, Prime Cable, Express, and Commercial, in response to the Imposter's applications for credit. Plaintiff argues that these disclosures were not made for a permissible purpose, because Plaintiff's file was disclosed based on a credit application by the Imposter. Before addressing this issue, the Court must first address a threshold inquiry--the statute of limitations.

1. The Effect of the Statute of Limitations

Section 1681p of the FCRA provided that:

> An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises, except that where a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this subchapter, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

15 U.S.C. § 1681p. This section clearly establishes a two year statute of limitations, within which time an action must be

brought. It is undisputed that the FCNB and Prime Cable disclosures were made more than two years before the filing of the Complaint in this case. Consequently, TRW argues that these two disclosures cannot form the basis of any liability. In contrast, Plaintiff argues that the limitations period does not begun to run until she knew or should have known of TRW's violation--the "discovery" rule. It is undisputed that if the discovery rule applies, then all the disclosures were made within the limitations period. Thus, the question for the Court, is the purely legal question of whether § 1681p includes an implied discovery rule.

An initial examination of the plain language of the statute suggests that there is no general discovery rule. The statute provides a two year limitations period, and a specific exception. When this exception applies, the limitations period is two years after discovery of the misrepresentation; however, this exception does not apply in this case, since there was no information required to be disclosed--Plaintiff does not argue otherwise.

"Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980); *In re McLinn*, 744 F.2d 677, 683 (9th Cir.1984). Thus, although Plaintiff argues that the discovery rule is normally read into statutes of limitations unless Congress has provided otherwise, *see Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1945), this appears to be such a case where Congress provided otherwise.

The Ninth Circuit has not addressed this issue in a published decision. However, numerous other Circuits have. The Third, Seventh, and Tenth Circuits have all held that § 1681p is not a discovery statute, except in the enumerated circumstance. *See Houghton v. Insurance Crime Prevention Inst.*, 795 F.2d 322, 325 (3d Cir.1986); *Rylewicz v. Beaton Serv., Ltd.*, 888 F.2d

1175 (7th Cir.1989); *Clark v. State Farm Fire & Cas.*, 54 F.3d 669 (10th Cir.1995). Additionally, district courts in the Ninth and Eleventh Circuits have also held the same way. *See Allen v. Equifax Credit Co.*, 1993 WL 483036 (D. Or.1993);[6] *Wilson v. Porter*, 921 F. Supp. 758 (S.D. Fla.1995). Only the Fifth Circuit has partially gone the other way. *See Hyde v. Hibernia Nat'l Bank*, 861 F.2d 446 (5th Cir.1988). In *Hyde*, the Fifth Circuit created a two-tiered system, whereby negligent violations were not subject to the discovery rule, while intentional violations were. However, *Hyde* failed to discuss the effect of the enumerated exception in § 1681p on the inquiry under *Andrus*. For this reason, *Hyde* is not persuasive. *See Clark*, 54 F.3d at 672 (criticizing *Hyde* on this basis).

Plaintiff argues that this Court should look to a Ninth Circuit case finding that a "similar" statute to the FCRA, the Privacy Act, had a discovery statute of limitations. However, the Privacy Act and the FCRA are not the same, and do not share the same purposes. The FCRA's purpose is to balance the needs of commerce and the rights of consumers. *See* 15 U.S.C. § 1681 (quoted above). The Privacy Act's "main purpose" is to "forbid disclosure [of certain information] unless such disclosure is required by the [Freedom of Information Act]." *Lovell v. Alderete*, 630 F.2d 428, 431 n.12 (5th Cir.1980). *See also Miller v. United States*, 630 F. Supp. 347, 348 (E.D.N.Y.1986) ("the purpose of [the Privacy Act] is to give individuals greater control over the gathering, dissemination, and accuracy of agency information about themselves").[7]

For these reasons, the Court agrees with the great weight of authority and holds that the discovery rule does not apply to the FCRA except in the one enumerated circumstance which does not apply to this case. Consequently, any claim for liability based on the FCNB and Prime Cable disclosures is barred by § 1681p.

2. Were the Three Remaining Disclosures Made in Violation of § 1681e(a)?

Having concluded that the discovery rule does not apply to this case, the three potentially actionable disclosures of Plaintiff's credit file were Trans Union's disclosure to Dillard's and TRW's disclosures to Express and Commercial. The Court will now consider whether these disclosures were lawful.

The full text of the applicable statute, 15 U.S.C. § 1681e(a), has been quoted above. Stripped to its essence, this section of the FCRA requires consumer reporting agencies to maintain "reasonable procedures" designed to limit disclosures of consumer credit reports to the permissible purposes enumerated in 15 U.S.C. § 1681b. The pertinent permissible purposes of § 1681b were also quoted above. These permissible purposes are disclosures to users who the consumer reporting agency has reason to believe intend to use the information in connection with a credit transaction involving the consumer, or otherwise have a legitimate business need for the information in connection with a business transaction involving the consumer. *See* 15 U.S.C. § 1681b(3)(A), (E).

Although there is a surprising paucity of cases interpreting the § 1681e(a) standard, a few general principles can be discerned. Initially, the analysis of a § 1681e(a) claim can be divided into two prongs. First, the Court must decide whether the consumer reporting agency made the disclosure to a person it had reason to believe had a statutorily authorized purpose for obtaining the report. If in fact the disclosure was made for a permissible purpose, then the inquiry ends, and no investigation of the reasonableness of the consumer reporting agency's procedures are necessary. *Middlebrooks v. Retail Credit Co.*, 416 F. Supp. 1013, 1016 (N.D.Ga.1976); *see also Alexander v. Moore & Assocs., Inc.*, 553 F. Supp. 948, 954 (D.Haw. 1982). Although these cases are not controlling, being only district court cases, this Court finds the analysis of *Middlebrooks* persuasive.[8] It makes no sense for a consumer whose file was disclosed only for permissible purposes to nevertheless be able to challenge the reasonableness of the consumer reporting agency's procedures. Rather, only a consumer whose file was disclosed for an impermissible purpose may challenge the reasonableness of the reporting agency's procedures.

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[6] *Allen* was affirmed by the Ninth Circuit in an unpublished disposition.

[7] Plaintiff also fails to explain why two of the Circuits holding that the discovery rule does not apply to the FCRA have nevertheless held that it does apply to the Privacy Act. *See Bowyer v. United States Air Force*, 875 F.2d 632, 636 (7th Cir. 1989); *Bergman v. United States*, 751 F.2d 314, 316 (10th Cir. 1984). Thus, there is no necessary correlation between whether the discovery rule applies to the Privacy Act and whether it applies to the FCRA.

Once the consumer has shown that their file was disclosed for an impermissible purpose, that does not end the inquiry. The FCRA does not provide for strict liability; liability is imposed only when the consumer reporting agency either willfully or negligently fails to maintain reasonable procedures to avoid improper disclosures. *Dobson v. Holloway*, 828 F. Supp. 975, 977 (M.D. Ga. 1993); *see also* 15 U.S.C. §§ 1681n & 1681o.

Thus, in the context of this case, the Court must first determine whether Plaintiff has raised a genuine issue of material fact as to whether the disclosures were improper. If so, the Court must make the same inquiry as to whether defendants have maintained reasonable procedures.

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[8] The Court located no contrary authority.

a. Were the Disclosures Permissible?

Plaintiff argues that the disclosures were not reasonable, because they were not furnished for a legitimate, statutorily authorized purpose, since Plaintiff's report was disclosed in response to the Imposter's applications for credit. As noted above, § 1681b(3) permits disclosures

> to a person which [the reporting agency] has reason to believe:
>
> (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
>
> . . . .
>
> (E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer."

15 U.S.C. § 1681b(3)(A), (E). Essentially, Plaintiff argues that the creditors obtaining her report were not intending to use the information in connection with a credit transaction involving *her*, but rather, in a transaction involving the *Imposter*. Although this argument is creative, the Court does not agree with it. Initially, Plaintiff has pointed to no authority adopting this argument. More importantly, it places too heavy a burden on consumer reporting agencies. Under Plaintiff's theory, any time an imposter adopted a consumer's identity, the disclosure of the consumer's information in response to a credit application by the imposter would be per se impermissible. Then the inquiry about the reasonableness of the reporting agency's procedures would always need to be conducted.

Additionally, a common sense reading of § 1681b is contrary to Plaintiff's position. In an imposter situation such as the case at bar, the recipient of the consumer's report (i.e., the potential creditor to the imposter) "intends to use the information in connection with a credit transaction involving the consumer." The consumer is "involved" in the transaction, because the imposter is purporting to be the consumer. Although in a strictly technical sense the transaction does not involve the "extension of credit to . . . the consumer, " § 1681b(3)(A), the Court finds this not to be dispositive. Moreover, § 1681b(3)(E) plainly appears applicable to these situations--a planned creditor of an imposter has a "legitimate business need" for the credit report of the person the imposter is impersonating.[9] By obtaining this information, the potential creditor may learn information making them suspicious of the imposter, leading them to deny credit. For example, TRW has

> trained its subscribers that an effective method to prevent occurrences of identity theft is for the credit grantor to carefully scrutinize inconsistencies between information provided by a [credit applicant] and information included in a TRW credit report provided to the subscriber and to pose questions to the applicant that only the genuine consumer would be able to correctly answer.

(TRW Genuine Issues ¶ 10.)

For the foregoing reasons, the Court finds as a matter of law that disclosing a consumer's credit report in response to a credit application by an imposter impersonating the consumer

by use of the consumer's identifying information is a disclosure for a permissible purpose under the FCRA, and accordingly, is not actionable under § 1681e(a). Therefore, no inquiry about the reasonableness of Defendants' procedures need be conducted, and Defendants' Motions for Partial Summary Judgment on Plaintiffs disclosure claim (count I) are GRANTED. Nevertheless, the Court will briefly address the reasonableness of Defendants' procedures as further support for its decision.

b. Were Defendants' Procedures Reasonable?

As discussed above, even when a consumer reporting agency makes an improper disclosure, liability attaches only upon a showing that the reporting agency willfully or negligently failed to maintain "reasonable procedures" designed to limit disclosures to those made for permissible purposes. *See* 15 U.S.C. § 1681e(a). Initially, the statute enumerates several requirements for those "reasonable procedures." "These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose." *Id.* Additionally, "every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report." *Id.* Further, "no consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in § 1681b of this title." *Id.*

There is no dispute that Defendants fully complied with these enumerated requirements. Trans Union has obtained a certification from Dillard's that it will request credit reports only for permissible purposes, and Trans Union has investigated the nature of Dillard's business (it is a retailer of goods which extends consumer credit) to confirm that Dillard's has a legitimate need for consumer credit reports. (*See* TU

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[9] At oral argument Plaintiff noted that § 1681b(3)(E) concluded with the term "involving *the* consumer" not "involving a consumer." Thus, Plaintiff argued, this section only applies when the subscriber has a legitimate business need for the information about the particular individual for whom the report is going to be provided. However, this argument misses the point--an individual is "involved" in a business transaction when a creditor contemplates extending credit to an imposter impersonating that individual. Despite not having chosen to enter a business transaction, that individual has nevertheless become involved by the actions of the imposter.

Genuine Issues ¶¶ 18, 19.) TRW has obtained similar certifications from Express and Commercial, and has conducted similar investigations of those businesses to determine that they have a legitimate need for consumer credit reports. (*See* TRW Genuine Issues ¶¶ 6, 7.)[10]

Plaintiff argues that compliance with these enumerated requirements is necessary, but not sufficient, to maintain "reasonable procedures" as required by § 1681e(a). This is true. It is apparent that despite having these blanket certifications from its subscribers, if Defendants released credit reports based on only a last name for instance, so that a subscriber's request for credit reports on everyone named "Smith" disclosed all such reports, this would not be reasonable. This, however, is not the situation presented in this case.

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[10] At oral argument Plaintiff argued that Defendants failed to comply with the final sentence of § 1681e(a), which provides that "no consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title." 28 U.S.C. § 1681e(a). Plaintiff characterized this sentence as requiring that Defendants could not disclose information if they had reasonable grounds for believing that information about a different person than was standing before the potential creditor was involved. Thus, Plaintiff argued, whenever Defendants disclosed information that they had reason to believe pertained to two individuals, they necessarily made an improper disclosure as to at least one of them. However, this argument, as discussed above, fails to acknowledge that more than one person may be "involved" in a particular business transaction; i.e., when the Imposter requested credit by impersonating Plaintiff, both the Imposter and the Plaintiff were involved in the transaction. Accordingly, Defendants' disclosure of both of their files was for a permissible purpose as a matter of law. Thus, Plaintiff points to no evidence that Defendants ever had reasonable grounds for believing that information they were about to furnish was not going to be used for a permissible purpose.

Plaintiff argues that summary judgment is rarely, if ever, appropriate, because the mere fact of an improper disclosure permits a jury to infer that the reporting agency's procedures were unreasonable. (*See, e.g.*, Pl.'s Opp. to TRW's Motion at 15-17.) This argument erroneously conflates the "disclosure" analysis of § 1681e(a) with the "accuracy" analysis of § 1681e(b). As will be discussed below, the standard under § 1681e(b) is much higher than it is under § 1681(e)(a). *Compare* 15 U.S.C. § 1681e(a) ("every consumer reporting agency shall maintain reasonable procedures designed to . . . limit [disclosures to those for permissible purposes]") with 15 U.S.C. § 1681e(b) ("[consumer reporting agencies] shall follow reasonable procedures to *assure maximum possible accuracy*"). Thus, Plaintiff's citation of cases applying § 1681e(b) is not persuasive in the § 1681e(a) arena.

Moreover, several cases *have* granted summary judgment to reporting agencies facing disclosure claims. The most illuminative of these cases is *Dobson v. Holloway*, 828 F. Supp. 975 (M.D. Ga.1993).[11] In Dobson, June Dobson and her husband Kenneth D. Dobson were negotiating to buy an automobile. The automobile dealer entered into its computer the name Kenneth D. Dobson, his address at 301 Willow, and social security number of 260-47-6068. The Defendant credit bureau used a "weighted value" system much like Defendants' computers in the instant case, to determine which consumer reports should be disclosed. Three files were disclosed:

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[11] Plaintiff argues that *Dobson* conflicts with the "binding Ninth Circuit case of *Guimond [v. Trans Union Credit Information Co.*, 45 F.3d 1329 (9th Cir.1995), and] the vast weight of authority from other circuits." (*See* Pl.'s Opp. to TRW's Motion at 20.) However, Plaintiff fails to acknowledge that *Guimond* and the other cited authority involve *accuracy* claims under § 1681e(b), not *disclosure* claims under § 1681e(a). Thus, there is no conflict.

I. Kenneth D. Dobson at 210 Southland St., social security number 260-47- 6068.

II. Kenneth V. Dobson at 210 Southland St., different social security number.

III. Dennis Dobson at 301 Willow, social security number 260-47-6068.

Id. at 977. Thus, the first report had the correct name and social security number, but a different address. The second report had a different middle initial, a different social security number, and a different address, although the address matched the address in the first report. The third report had a different first name, but the correct address and social security number. As it turned out, the first and third reports actually belonged to the consumer. The second report belonged to the consumer's father, who sued the reporting agency for an impermissible disclosure under § 1681e(a).

The *Dobson* district court assumed arguendo that the plaintiff's credit file was disclosed for an improper purpose, but nevertheless it granted the reporting agency's motion for summary judgment, finding that as a matter of law the agency's procedures were reasonable. *Id.* at 977-78. The court noted that the agency had a certification from the dealership that it would only request reports for permissible purposes, and that the agency knew that an automobile dealership had an obvious need for credit reports.

The court then considered the weighted value system for determining which reports were sufficiently similar to the request to be disclosed, and concluded that the agency's procedures were reasonable as a matter of law. The court considered and rejected the plaintiff's argument that the agency should have required a better match, or at least a matching social security number, before disclosing his file. *Id.* at 977. The court noted that if an exact social security number, or an exact name, was required for a file to be displayed, important

relevant information would not be disclosed. For example, in Dobson, the third report indicated credit that the actual consumer had previously obtained under the name Dennis Dobson, rather than his actual name of Kenneth D. Dobson.[12] *Id.* Requiring a more exact match would have deprived the credit grantor of this relevant information. *Cf.* 15 U.S.C. § 1681(a)(1) ("the banking system is dependent upon fair and *accurate* credit reporting"; accuracy includes completeness).[13]

In the instant case, the disclosures were made on a better match than in Dobson. There, the social security number and address did not match, nor did the middle initial. In the instant case, the social security number matched exactly,[14] along with the last name and first initial. This match, in conjunction with the certifications by, and investigations of, Defendants' subscribers, constitutes a reasonable procedure designed to limit disclosures to those permissible under § 1681b.[15] Thus, this constitutes an independent grounds for GRANTING Defendants' Motions for Partial Summary Judgment on Plaintiff's disclosure claim.

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[12] Presumably, the "D" in Kenneth D. Dobson stood for Dennis, although this is unclear.

[13] This Court can take judicial notice of the fact that consumers: use different forms of their names in identifying themselves (nick names, inclusion/exclusion of middle names/initials, maiden names, hyphenated married names, etc.); change addresses; have multiple addresses (residence/business, summer/winter/vacation residences, school/permanent addresses, mailing addresses, etc.); and that typographical errors are made in reports of credit transactions from which consumer reporting agencies obtain information. *See* Fed. R. Evid. 201(b)(1). Moreover, there is evidence of such facts in the record. (*See* O'Neil Supp. Decl. Ex. A (Romanowski Decl.) ¶ 4.)

[14] Plaintiff argues that attaching excessive weight to the social security number is unreasonable, because there are only one billion possible social security numbers (since it is nine digits long); with approximately 250 million people in the United States, an imposter would have a one in four chance of guessing someone else's actual social security number. (*See* Pl.'s Opp to TRW's Motion at 20 n.20.) This argument is frivolous, as nobody suggests using *only* a social security number as the identifying information enabling disclosure. While an imposter has a one in four chance of guessing *someone's* social security number, they have essentially *no* chance at all of guessing both their social security number and their name.

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[15] Plaintiff's Parker Declarations, by her computer expert, do not alter this analysis. Parker's testimony falls into several categories. First, Parker opines that "based upon a plain reading of 15 U.S.C. § 1681e(a), it is my opinion that Trans Union violated the mandate set forth in the first sentence of 15 U.S.C. § 1681e(a) in connection with Adelaide Andrews, claims . . . ." (TU Parker Decl. ¶ 16.) (There is a similar quote regarding TRW in the TRW Parker Decl.; TRW objects to this Parker Declaration on a variety of grounds.) This opinion and several others like it are inadmissible because Parker lacks foundation to render legal conclusions; moreover, Defendants' liability does not rest on a computer expert's "plain reading" of a federal statute. Rather, it is the duty of this Court to interpret the statute, in light of relevant authority, to discern its import. As described above, this Court finds as a matter of law that the disclosure of Plaintiff's file under the circumstances of this case was neither for an impermissible purpose, nor the result of unreasonable procedures. Either one of these findings is alone sufficient to support summary judgment. Another category of Parker's testimony consists of his opinions that Defendants' computers and procedures were outmoded and better alternatives were available. (*See, e.g.*, TRW Parker Decl. ¶ 14 .) However, this testimony is irrelevant; to the extent it goes to Plaintiff's accuracy claims, where it may otherwise be relevant, TRW did not move on this claim, and Trans Union's Motion on this claim is denied, as explained below. To the extent that it goes to the Disclosure claims, the Court has held that the disclosures in question were for a permissible purpose and were reasonable as a matter of law. The expert testimony of a computer expert is not relevant to either of these determinations.

The other category of Parker's testimony contained within his declarations is factual information about Defendants' operations and the alternatives available. Given the Court's analysis, this factual information is irrelevant.

B. Plaintiff's "Accuracy" Claim

Plaintiff's "accuracy" claim is made under 15 U.S.C. § 1681e(b), which provided that:

> Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

15 U.S.C. § 1681e(b). Although Plaintiff asserts an accuracy claim against both Defendants, only Trans Union has moved for summary judgment on this claim.

As noted above, this section imposes a higher standard on consumer reporting agencies than § 1681e(a) does, due to the "assure maximum possible accuracy" language. A fairly recent Ninth Circuit case, *Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329 (9th Cir. 1995), explains the analysis to be followed in "accuracy" cases brought under § 1681e(b). In *Guimond*, the Ninth Circuit reversed the district court's grant of summary judgment to the consumer reporting agency on a § 1681e(b) claim. Initially, the Ninth Circuit held that liability under 1681e(b) did not require the plaintiff to have suffered any pecuniary loss as a result of the inaccuracy in order to recover, nor is there any requirement that the plaintiff had been denied credit; the mere compilation and/or retention of erroneous information can be sufficient, if this caused the plaintiff some damage, such as emotional distress. *Id.* at 1333.

A consumer can establish a prima facie case under § 1681e(b) by presenting evidence tending to show that a credit reporting agency prepared a report containing inaccurate information. *Id.* Once the consumer does so, because the FCRA does not provide for strict liability, the consumer reporting agency can escape liability if it establishes that the inaccurate report was generated despite the agency's following reasonable procedures. *Id.* "The reasonableness of the procedures and whether the agency followed them will be jury questions in the overwhelming majority of cases." *Id.*

Applying this analysis to the instant case, the burden is first on Plaintiff to raise a genuine issue of material fact that Trans Union prepared a report on her containing inaccurate information. If she does so, then Trans Union has an opportunity to show that it followed procedures which were reasonable as a matter of law; however, as the above quote from *Guimond* demonstrates, such proof of reasonableness is a question of fact for a jury in the "overwhelming majority" of cases.

Plaintiff points to two things in her report which she contends are inaccurate: 1) the information Trans Union furnished to Chase Credit Research and 2) the Dillard's inquiry. These will be addressed in turn.

1. The Information Provided to Chase

As described above, Plaintiff went to Home Savings to inquire about refinancing the mortgage on her home. In connection with this inquiry, Home Savings obtained a credit report on Plaintiff from Chase Credit Research, a non-party credit reporting agency. Chase prepared this credit report by obtaining credit reports on Plaintiff from Defendants Trans Union and TRW, and non-party credit reporting agency Equifax. Chase combined the information from these three individual credit reports into a composite report which it furnished to Home Savings.

The Chase report listed the Imposter's Dillard's account as being delinquent. (Cohan Depo. Ex. 151 (the Chase Report) at 3.) This information was attributed to Trans Union and/or TRW. (*Id.*) Plaintiff argues that this attribution of the delinquent Dillard's account to Plaintiff was an inaccuracy on her report, establishing her prima facie case of a violation of § 1681e(b). Moreover, Plaintiff argues another inaccuracy, in

that Trans Union reported a Capitol One account as being hers, even though it was not hers.

a. The Capitol One Account

Turning first to the Capitol One account, the Chase report does indeed list such an account as belonging to Plaintiff. (*See* TU May Decl. Ex. C. (the Chase report).)[16] Moreover, the Chase report clearly indicates that this information was provided only by Trans Union, unlike most of the other information, which was provided by several consumer reporting agencies. (*Id.*) Although the Capitol One account was listed as "current," if this account did not belong to Plaintiff, that would nevertheless be an inaccuracy meeting Plaintiff's burden and establishing her prima facie case.

Plaintiff argues in her Opposition that Trans Union reported that Plaintiff had an account with Capitol One, although she did not. (Pl.'s Opp. to TU's Mot. at 9:14-15.) As support, Plaintiff cites to the TU May Declaration Exhibits C and E. However, these exhibits do not show that the Capitol One account did not in fact belong to Plaintiff. Exhibit C is merely a copy of the Chase report; while it lists the Capitol One account as being reported by Trans Union, it does not indicate that the account did not actually belong to Plaintiff as she argues. Exhibit E is a June 6, 1995 letter from Plaintiff to a variety of people stating that he had just discovered that several things on her credit report were not hers, and that she was a victim of identity fraud. This letter lists five accounts as not belonging to Plaintiff: 1) Dillard's; 2) Prime Cable; 3) FCNB;

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[16] Since Plaintiff is opposing separate Motions by each Defendant, she has filed separate Oppositions as well as supporting declarations for each Opposition. Plaintiff's Oppositions will be cited as "TRW Opp." for Plaintiff's Opposition to TRW's Motion, and "TU Opp." for her Opposition to Trans Union's Motion. Similarly, the two "May" Declarations (one for each Opposition) will be cited as the "TRW May Decl." and the "TU May Decl."

4) Express; and 5) Commercial. Notably absent from this list is Capitol One. Moreover, this letter indicates that it was sent to eleven recipients, including the five creditors listed above, Trans Union, TRW, Equifax, Chase, a collection agency, and the Reno Police; but not Capitol One. This suggests that perhaps the Capitol One account really is Plaintiff's, and that its listing was thus not an error.

Plaintiff's Statement of Genuine Issues in Opposition to Trans Union's Motion also states that "Plaintiff, however, has never applied for or maintained a consumer credit account with Dillard's or Capitol One." (TU Genuine Issues ¶ 13.) However, as support for this assertion, Plaintiff cites only to the TU May Declaration Exhibit B at 78:10-12, and 134:1-6, and Exhibit E. This evidence does not support Plaintiff's assertion either. Exhibit B consists of excerpts from Plaintiff's deposition. Page 78 addresses only the Dillard's account, not the Capitol One account. Page 134 mentions Capitol One, but only states that "an inquiry" was fraudulent. (TU May Decl. Ex. B at 134:1-6.) Moreover, Plaintiff went on to say that she believed that the Imposter was denied credit by Capitol One. (*Id.* at 134:7-10.) However, the Chase report lists the Capitol One account as being "current" with a balance of $605, indicating that it was an existing account. (TU May Decl. Ex. C.) Thus, again it appears that the Capitol One account may have belonged to Plaintiff, making Trans Union's report not inaccurate. At any rate, Plaintiff has failed to present admissible evidence, see Fed. R. Civ. Proc. 56(e), that the Capitol One account was not properly attributed to her.[17]

Consequently, the Capitol One account does not support Plaintiff's accuracy claim under § 1651e(b).

b. The Dillard's Delinquency

Plaintiff next argues that the Dillard's delinquency reported to Chase was an inaccuracy establishing her prima facie case under § 1681e(b). The Chase report does indeed list the Dillard's account as being delinquent and as belonging to Plaintiff. (*See* TU May Decl. Ex. C.) Additionally, it is undisputed that the Dillard's account did not belong to Plaintiff. (*See* TU Genuine Issues ¶ 51 ("Trans Union determined that the Dillard's account was obtained fraudulently and did not belong to plaintiff").) However, there are two other hurdles for Plaintiff to meet in using the Dillard's account to establish inaccuracy under § 1681e(b): that it was Trans Union who reported the Dillard's account to Chase, and that Trans Union reported the delinquent Dillard's account as belonging to Plaintiff.

Unlike the Capitol One account which the Chase report indicates was reported only by Trans Union, the Dillard's account was reported by Trans Union and/or TRW. However, as will be discussed separately in Section V.D. below, TRW has provided evidence that its computer records showed the Dillard's account as being current as of the date of the Chase report. Consequently, there is at least a genuine issue of material fact that the delinquent status of the Dillard's account was reported to Chase by Trans Union.

A thornier issue is presented by whether Trans Union actually reported any inaccurate information at all. Plaintiff's theory is straightforward--Trans Union attributed the delinquent Dillard's account to Plaintiff in its report to Chase, which is an inaccuracy. In reply, Trans Union argues that it did no such thing; rather, according to Trans Union, it disclosed two separate accurate credit reports in response to the Chase inquiry--Plaintiff's report not containing the Dillard's account and the Imposter's report, accurately including the Dillard's account which the Imposter actually had. Under this theory, it is the non-party Chase which erroneously commingled these two reports, thereby attributing the Imposter's Dillard's account to Plaintiff.

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[17] More accurately, Plaintiff has failed to point out to this Court any evidence in the record that the Capitol One account was not hers. Given that the parties have submitted several thousand pages of evidence, the Court has not, and need not, searched the entire record for evidence of this fact. *See Nilsson, Robbins, et al. v. Louisiana Hydrolec*, 854 F.2d 1538, 1545 (9th Cir.1988) (district court need not search through a voluminous record to locate and identify facts helping non-moving party avoid summary judgment).

There are two problems with Trans Union's theory: First, the evidence is equivocal that this is actually what happened. As will be discussed below in section V.C., Trans Union vigorously argues that the FCRA requires that a consumer's credit report list all the subscribers that it was disclosed to. (*See, e.g.*, TU's Motion at 11:13-19.) A copy of Trans Unions records, located as TU May Declaration Exhibit P, while difficult to fully interpret, suggests that Trans Union's disclosure to Chase was of Plaintiff's file, not the Imposter's file. In this exhibit, Plaintiff is identified as "01A" while the Imposter is identified as "01B". (*See* TU May Decl. Ex. P at 204, 204A.) Consistent with this identification, numerous credit accounts that belong to Plaintiff are identified with the "01A" code. (*Id.* at 204B-204E.) The Dillard's account is identified with the "01B" code. (*Id.* at 204E.) However, the Chase inquiry is identified only with the "01A" code. (*Id.* at 204F.)

Although subject to different interpretations, this suggests that Trans Union considered the Chase disclosure to be of Plaintiff's file, not the Imposter's file. Plaintiff advanced this argument and pointed to this evidence in her Opposition, yet Trans Union failed to address it in its Reply. In the face of this evidence and argument, a jury could reasonably conclude that Trans Union did not disclose both Plaintiff's and the Imposter's file, but rather, only disclosed Plaintiff's file, which contained the Dillard's account. Thus, Plaintiff has raised a genuine issue of material fact precluding summary judgment for Trans Union on Plaintiff's accuracy claim. However, as further grounds for

this decision, the Court will also address several other issues relating to the accuracy claim.

Even if the Court were to accept Trans Union's argument that it disclosed two separate reports in response to the Chase inquiry, an accurate one on Plaintiff, and an accurate one on the imposter containing the Dillard's account, that does not end the inquiry. Plaintiff argues that this procedure, supplying the Imposter's credit report in response to an inquiry about Plaintiff, is itself an inaccuracy. Under this argument, by disclosing two reports in response to one inquiry, Trans Union essentially creates an inaccurate report on Plaintiff containing the information both from Plaintiff and the Imposter. Although Trans Union considers the two reports to be separate, Plaintiff argues that it is foreseeable that the recipient of the reports may consider them to be one report.

Plaintiff's argument has merit. Section 1681e(b) targets not only "strictly" inaccurate information, but also information that is "technically accurate" but nevertheless misleading. *See Pinner v. Schmidt*, 805 F.2d 1258, 1262-63 (5th Cir. 1986); *Koropoulos v. The Credit Bureau*, 734 F.2d 37, 40-42 (D.C. Cir. 1984) ("Congress did not limit the Act's mandate to reasonable procedures to assure only technical accuracy; to the contrary, the Act requires reasonable procedures to assure 'maximum accuracy.' [R]eports containing factually correct information that nonetheless mislead their readers are neither maximally accurate nor fair to the consumer who is the subject of the reports."); *Alexander v. Moore & Assocs., Inc.*, 553 F. Supp. 948, 952 (D.Haw. 1982) (stating that consumer reporting agency cannot accurately report that a consumer was "involved" in a credit card scam without reporting that the consumer was actually one of the victims of the scam, not a perpetrator).

This Court finds that the return of separate files on Plaintiff and the Imposter in response to an inquiry about Plaintiff, may well be "technically accurate yet misleading." Although Trans

Union argues that the files were "clearly presented" as separate files, (TU Reply at 4:7-12), including a "Trans Alert" message telling the subscriber that the file address did not match the inquiry address, and a message stating "possible other file to follow," (*see* TU Genuine Issues ¶¶ 21-24), Plaintiff has raised a genuine issue of material fact as to whether this presentation, taken as a whole, was misleading. The Court notes that a jury may well conclude that Trans Union's response to the Chase inquiry was not misleading. Or, a jury may conclude that even if it was misleading, Trans Union's procedures were nevertheless reasonable to "assure maximum possible accuracy." However, these are inquiries for a jury, not for this Court on a motion for summary judgment. *See Guimond*, 45 F.3d at 1333 ("[t]he reasonableness of the procedures and whether the agency followed them [in § 1681e(b) cases] will be jury questions in the overwhelming majority of cases").

2. The Dillard's Inquiry

Plaintiff also argues that the presence of the Dillard's inquiry[18] on her credit report constitutes an inaccuracy.[19] Trans Union makes two arguments in response: a) that the Dillard's inquiry is accurate, and b) that reporting it is required by the FCRA. These will be addressed in turn.

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[18] In addition to listing actual credit accounts on a credit report, credit reports also list "inquiries" which indicate all the entities which have received a copy of the report in question in the past. For example, Trans Union listed Plaintiff's credit accounts under the heading "the following accounts are reported with no adverse information." (*See* TU May Decl. Ex. K at 137.) Trans Union listed the inquiries under the heading "the following companies have received your credit report. Their inquiries remain on your credit report for two years. (Note: 'consum discl' refers to Trans Union consumer relations and are not viewed by creditors." (*Id.* at 140.) Included among the inquiries listed on Plaintiff's September 12, 1996 Trans Union report was the Dillard's inquiry. (*Id.* at 141.)

[19] This claim is intertwined to some extent with Plaintiff's reinvestigation claim under § 1681i(a), which will be discussed below in section V.C.

a. Was the Dillard's Inquiry Inaccurate?

Trans Union argues that it really did disclose Plaintiff's report to Dillard's in response to the Imposter's credit application there; accordingly, reporting this inquiry on Plaintiff's file is completely accurate. In a strictly technical sense, of course, this is true; it is undisputed that Plaintiff's report was disclosed to Dillard's. However, the presence of the inquiry on Plaintiff's report would seem to suggest that *Plaintiff* applied for credit with Dillard's.[20] Yet, that was not the case. Accordingly, this Court finds that Plaintiff has established a genuine issue of material fact as to whether listing the Dillard's inquiry on Plaintiff's report was misleading.

b. Was the Dillard's Inquiry Required by the FCRA?

Trans Union also argues that the FCRA required it to list the Dillard's inquiry. (*See* TU Motion at 11:13-19.) As support, Trans Union cites to 15 U.S.C. § 1681g(a)(3), which assertedly "*requires* consumer reporting agencies to disclose the 'recipients of any consumer report on the consumer which it has furnished.' " (TU Motion at 11:15-17 (emphasis in original).) Although this quotation is "technically accurate" it is misleading; by its express terms, section 1681g(a)(3) actually required the consumer reporting agency to make the above disclosure *to the consumer*. *See* 15 U.S.C. § 1681g(a) ("Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer . . . (3) the recipients of any consumer report on the consumer. . . .") This section says nothing about requiring such disclosures to be made to *creditors* of the consumer.[21]

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[20] This is especially true since some creditors view the number and nature of inquiries present on a credit report to be a relevant factor in evaluating credit applications. (*See* TU May Decl. Ex. N. (Beavert Depo.) at 78:25-79:16.) It is interesting to note that when Trans Union's Director of Consumer Relations and Fraud Victim Assistance, Diane Terry, was herself the victim of identity fraud, she had the inquiries removed from her credit file (although at other consumer reporting agencies, not Trans Union). (TU May Decl. Ex. Q (Terry Depo.) at 55-59.)

Moreover, Trans Union's asserted compulsion to disclose rings hollow considering that it has recently changed its policy and, in cases of true name fraud such as involved here, now removes all inquiries relating to the fraudulent accounts. (*See* TU May Decl. Ex. A (Reger Depo.) at 189:24-190:7.)

For the above reasons, the Court finds that Trans Union was under no duty to report to its subscribers the fact that Plaintiff's report was disclosed to Dillard's, especially since such disclosure was made as a result of the Imposter's credit application. Consequently, Trans Union's argument that it only reported what it was required by the FCRA to report is without merit.

3. Plaintiff's Social Security Number in the Imposter's File

Although the parties do not discuss this next point, there is one additional possible inaccuracy making summary judgment inappropriate. In its Statement of Uncontroverted facts, Trans Union states that "[o]n June 5, 1995, Trans Union maintained in its computerized files a file relating to 'Andrea Andrews,' which contained the same social security number as plaintiff and the Dillard's account referenced in the Chase Credit report." (TU Stmt. Uncontroverted Facts ¶ 38.) In other words, Trans Union's file on the Imposter contained Plaintiff's social security number. In *Lowry v. Credit Bureau, Inc.*, 444 F. Supp. 541 (N.D.Ga. 1978), the credit agency's motion for summary judgment on a § 1681e(b) claim was denied, because of the presence of that plaintiff's (James Francis Lowery's) social security number in the file of one James Frank Lowery. *See id.* at 544.

It is true that *Lowry* arose in a different context, as that case did not involve identity fraud. In *Lowry*, the plaintiff's social security number was included in the other person's file as a result of one of the agency's subscriber's actions. *Id.* The court found that this inaccuracy might have arisen from a failure to have reasonable procedures to assure maximum possible accuracy. *Id.* In the instant case, Plaintiff's social security number was included in the Imposter's file presumably as a result of the Imposter's intentional misrepresentation of herself as Plaintiff. Nevertheless, this distinction goes to the reasonableness of the agency's procedures, and not to whether the inclusion of a consumer's social security number in someone else's file is an inaccuracy. It may well be that Plaintiff's social security number wound up in the Imposter's file despite Trans Union's reasonable procedures. But, as *Guimond* teaches, this is a question for the jury in the "overwhelming majority of cases." *See Guimond*, 45 F.3d at 1333.

It is for all of the above reasons that Trans Union's Motion for Summary Judgment on Plaintiff's accuracy claim under § 1681e(b) is DENIED.

C. Plaintiff's "Reinvestigation" Claim

Plaintiff's third cause of action, her "reinvestigation" claim, asserted only against Defendant Trans Union, is made under § 1681i(a). This section provided that:

> If the completeness or accuracy of any item of information contained in his file is disputed by a consumer, and such dispute is directly conveyed to the consumer reporting agency by the consumer, the consumer reporting agency shall within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute by the

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[21] That Trans Union reported the Dillard's inquiry to its subscribers, not merely to Plaintiff herself, is shown by the wording on the report. *See supra* note 18 ("inquiries remain on your credit report for two years").

> consumer is frivolous or irrelevant. If after such reinvestigation such information is found to be inaccurate or can no longer be verified, the consumer reporting agency shall promptly delete such information. The presence of contradictory information in the consumer's file does not in and of itself constitute reasonable grounds for believing the dispute is frivolous or irrelevant.

15 U.S.C. § 1681i(a). Although Plaintiff's Complaint alleges that Trans Union failed to remove the Dillard's account in a timely manner and that Trans Union tried to shift the reinvestigation burden onto Plaintiff, (Complaint ¶ 17), Plaintiff appears to have abandoned these arguments, as she fails to argue them in her Opposition.[22] Instead, Plaintiff's reinvestigation claim now appears to be based only on the Dillard's inquiry[23] appearing in her report as late as September 1996.

Much as she argues in her accuracy claim as described above in section V.B.2., Plaintiff argues that Trans Unions' reporting of the Dillard's inquiry constitutes inaccurate information which she disputed and which she conveyed that dispute about to Trans Union. Under this argument, Trans Union violated § 1681i(a) when it failed to remove the inquiry from Plaintiff's report following its reinvestigation.

In contrast, Trans Union argues, much as it did on Plaintiff's accuracy claim, that the Dillard's inquiry was accurate and its

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[22] Moreover, it is apparently undisputed that Trans Union contacted Dillard's, determined that the Dillard's account was fraudulently obtained and did not belong to Plaintiff, and suppressed the Dillard's account from Plaintiff's credit reports, all within less than three weeks of Plaintiff first informing Trans Union of the problem. (*See* TU Genuine Issues ¶¶ 39, 48-52.)

[23] This inquiry was described above in note 18.

presence on Plaintiff's report was mandated by 1681g(a)(3). These arguments have been addressed above. A jury could reasonably conclude that listing the Dillard's inquiry, especially after Trans Union *knew* that it was generated as a result of the Imposter's credit application, is inaccurate. Further, as discussed above, the FCRA did not require such disclosures to be made to creditors; only to the consumer herself. *See* 15 U.S.C. § 1681g(a).

Trans Union also argues that even if Plaintiff was not subjectively content with Trans Union's reinvestigation, the issue is whether their reinvestigation was reasonable, taking into account that the standard under § 1681i is less stringent than that imposed by § 1681e(b). (*See* TU Motion at 16:3-8.) Although the standard under § 1681i is lower than under § 1681e(b), this Court certainly cannot conclude as a matter of law that it was reasonable for Trans Union to continue reporting the Dillard's inquiry on Plaintiff's credit reports, even after determining that "the Dillard's account was obtained fraudulently and did not belong to plaintiff." (TU Genuine Issues ¶ 51.)

Finally, Trans Union argues that it "had no obligation to investigate or remove the inquiry because plaintiff never requested such action by Trans Union." (TU Reply at 5:20-21.) As quoted above, § 1681i(a) does indeed require the consumer to "dispute" the information, and convey that dispute directly to the consumer reporting agency. 15 U.S.C. § 1681i(a). However, a jury could reasonably conclude that Plaintiff's June 6, 1995 letter to Trans Union stating that she "*did not request credit* nor [is she] the person who is now not paying those [including the Dillard's account] bills," (TU May Decl. Ex. E (emphasis added)), constitutes a dispute and a conveyance of that dispute to Trans Union. Based on that letter, especially the fact that it states that Plaintiff never requested credit from Dillard's, a jury may conclude that it should have been clear to Trans Union that the inquiry related to the Imposter's activities, not to Plaintiff's, and that it thus should have been deleted.

For the foregoing reasons, Trans Union's Motion for Partial Summary Judgment on Plaintiff's reinvestigation claim under § 1681i(a) is DENIED.

D. Plaintiff's Economic Damages

Defendant TRW seeks summary adjudication that Plaintiff did not suffer any economic damages as a result of the report which TRW provided to Chase on May 31, 1995. As described above, Plaintiff visited Home Savings on that date to inquire about refinancing her home mortgage. Home Savings obtained a report from Chase, which Chase prepared by combining reports from TRW, Trans Union, and non-party Equifax. The Chase report listed the Imposter's Dillard's account as being delinquent. (Cohan Depo.Ex. 151 (the Chase Report) at 3.) This information was attributed to Trans Union and/or TRW. (*Id.*) After seeing this derogatory information on the Chase report, Plaintiff did not apply for the loan with Home Savings, allegedly believing that it would not be approved. Instead, she obtained a second trust deed equity line with Merrill Lynch, allegedly at a higher interest rate.

It is undisputed that on May 31, 1995, the date of the Chase report, TRW's computer files indicated that the Dillard's account was current and being paid on time. (TRW Genuine Issues ¶ 20.) TRW argues that this proves that it was Trans Union, not TRW, which reported the Dillard's account as being delinquent. This argument is well taken. The Chase report indicates that the Dillard's account was reported by TRW and/or Trans Union, and since it is undisputed that TRW believed the Dillard's account to be current, it necessarily must have been Trans Union which reported the delinquency. Regardless, it could not have been TRW reporting the delinquency; at least, Plaintiff provides no evidence suggesting that it could have been.

Instead, Plaintiff argues that the mere fact that TRW was reporting the Dillard's account at all served to confirm Trans Union's reporting of that account as delinquent. (*See* TRW Opp. at 27-28.) The Court does not accept this argument. Plaintiff offers no evidence (or even argument) that the Chase report would have been different had TRW not reported the Dillard's account at all. It is not as if Chase only reported information that it obtained from at least two sources; there are numerous entries on the Chase report that were reported by only one agency. (See TRW May Decl. Ex. B (the Chase Report) ("Assoc Finc" reported only by Trans Union; Capitol One reported only by Trans Union; Citibank reported only by CBI; MBGA reported only by Trans Union; Silverwoods reported only by TRW; and U.S. West reported only by CBI).)

Plaintiff next argues that TRW is liable because "based on the [Chase] report, Plaintiff and Mr. Beavert [the Home Savings loan person] each actually concluded that both TRW and Trans Union were reporting the delinquency." (TRW Opp. at 28.) This argument is without merit. It is irrelevant what Plaintiff and Mr. Beavert may have (erroneously) concluded from the Chase report; TRW cannot be held responsible for the erroneous inferences drawn from a document it did not prepare.[24]

The only way that TRW's reporting of the Dillard's account could have contributed in any way to Plaintiff's economic damages caused by the Chase report, would be if Home Savings would have considered the Dillard's account, reported as current and being paid on time, as a negative. Plaintiff provides no evidence that this is so, likely because common sense indicates that it is not so. Moreover, TRW provides evidence that the Dillard's account, reported as current, would actually have been a favorable factor in determining whether Home Savings would refinance Plaintiff's loan. (Lussier Decl. Ex. P. (Beaverton Depo.) at 39:5-40:14.) Thus, TRW's report on Plaintiff to Chase did not cause her any economic damages; consequently, TRW cannot be liable for those

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[24] Under Plaintiff's theory, had Chase completely mangled the report it received from TRW, and falsely indicated that accounts which actually belonged to Plaintiff and were reported by TRW as current were not current, TRW would be liable. This clearly makes no sense.

economic damages.[25] Accordingly, TRW's Motion for Summary Adjudication of this issue is GRANTED.

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[25] Another problem with Plaintiff's claim for economic damages arising out of the Chase report is that she was never denied the Home Savings loan, because she never applied for it. Plaintiff argues that the reason she never applied was that she was dissuaded from applying based on the mistakes in the Chase report. Under the right circumstances, this argument would have merit; there is no requirement in the FCRA that a consumer actually be denied credit to have a claim for damages. However, in this case, Plaintiff states that it was "her understanding that the loan could not be approved without *clearing up* [the Dillard's delinquency.]" (TRW Opp. at 28:23-24 (emphasis added).) Based on this, Plaintiff obtained a higher priced loan from Merrill Lynch. Beavert, the Home Savings Loan person, testified that not only would he not have discouraged Plaintiff from applying for the Home Savings loan, it was his opinion that had she applied, she would have received the loan. (Lussier Decl. Ex. P (Beaverton Depo.) at 41:13-42:24.) It is true that Beaverton did not have final decision making authority to approve loans. (TRW May Decl. Ex. 6 at 9:24-10:2.) Nevertheless, as the Home Savings Loan Consultant, Beaverton has foundation to offer an opinion on the likelihood of a loan being approved. More importantly, it is undisputed that TRW deleted all references to the fraudulent accounts from Plaintiff's file within 30 days of being told of the problem. (*See* Pl.'s Compl. ¶ 17.) This is why Plaintiff's reinvestigation claim is asserted only against Trans Union, and not TRW. And as discussed above, even Trans Union had deleted the Dillard's account, leaving only the inquiry, within three weeks of Plaintiff's Home Savings visit. Thus, within a month or less, Plaintiff had "resolved" the Dillard's matter. Yet Plaintiff never applied for the Home Savings Loan, choosing instead to apply for the allegedly higher-priced Merrill Lynch loan. Consequently, Plaintiff has not met her burden of showing a genuine issue of material fact that TRW caused her any economic damages as a result of the Chase report. *See Ladner v. Equifax Credit Information Servs.*, 828 F. Supp. 427, 432 (S.D.Miss. 1993) (granting summary judgment, finding no economic damages; the plaintiff had failed to apply for a loan after being told that the (erroneous) information on her report would cause her application to be denied; the plaintiff offered no explanation why she did not apply for the loan after resolving the problems in her report).

E. Plaintiff's State Law Claim

Although Plaintiff asserts her state law claim against both Defendants, only Trans Union moves for partial summary judgment on this claim. Trans Union makes two arguments in support of its Motion on this issue. First, Trans Union argues that Plaintiff's state law claim under California Business and Professions Code § 17200 *et seq.* "must fail because, as demonstrated above, plaintiff has failed to prove any predicate violations of the FCRA." (TU Motion at 25.) This argument is predicated on Trans Union's belief that it would win summary judgment on all of Plaintiff's FCRA claims. Since this is not the case, as explained above, this argument necessarily fails. If Plaintiff proves her FCRA claims, that would also prove her section 17200 claim. *See Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 71 Cal. Rptr. 2d 731, 950 P.2d 1086 (1998) (section 17200 includes "anything that can properly be called a business practice and that at the same time is forbidden by law").

Trans Union's second argument is that Plaintiff has only pled a claim for damages, which are not available under the California statute. (*Id.*) This is a mischaracterization of Plaintiff's Complaint, which clearly seeks injunctive relief and disgorgement of any profits resulting from Defendants' unlawful acts of failures to act. (Compl. ¶¶ 39, 40.) Plaintiff's entitlement to injunctive relief will be addressed below.

However, Plaintiff is potentially entitled to disgorgement, if she proves her claims. *See People v. Thomas Shelton Powers, M.D., Inc.*, 2 Cal. App. 4th 330, 339, 3 Cal. Rptr. 2d 34 (1992) ("there is little question but that the broad range of remedies provided for [in section 17203] includes restitution and/or disgorgement of profits"). Initially, although *Powers* was brought by the San Francisco District Attorney under section 17204, this section also permits suits by private individuals acting on behalf of the general public. *See* Cal. Bus. & Prof. Code § 17204. Plaintiff's Complaint alleges that she is acting on behalf of the general public. (Compl. ¶ 40.) Moreover, the *Powers* court rejected the argument that "a wrongdoer should be entitled to retain its illegal profits simply because there is no cognizable direct victim to be made whole." *Powers*, 2 Cal. App. 4th at 341, 3 Cal. Rptr. 2d 34. The court stated that:

> disgorgement [is] authorized so that illicit profits may be disgorged to some entity or party in a position to use it to correct, as much as possible, the harm wrought by the unfair practice. [T]he laws against unfair business practices were drafted in large part to prevent a wrongdoer from retaining the benefits of its illegal acts. That purpose would be frustrated if a party were entitled to retain its profits simply because it is difficult to specify the victim.

Id. at 341-42, 3 Cal. Rptr. 2d 34. Thus, while this Court certainly expresses no view on the likelihood that Plaintiff will prevail on her state law claim in the end, Trans Union has failed to meet its initial burden of showing a lack of genuine issues of material fact. Accordingly, Trans Unions Motion for Partial Summary Judgment on this issue is DENIED.

F. Plaintiff's Punitive Damages Request

Plaintiff seeks punitive damages against each Defendant, and each Defendant has moved for partial summary judgment on this request. After setting out the appropriate legal standards, the Court will address each Defendant's Motion in turn.

The FCRA provided that:

> Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of . . . (2) such amount of punitive damages as the court may allow . . . .

15 U.S.C. § 1681n. Although punitive damages are permitted even without malice or evil motive, the violation must have been willful. *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986) (vacating jury award of punitive damages). Although "'willful' is a word of many meanings," one definition that is often used in this context is "knowingly and intentionally committed an act in conscious disregard for the rights of others." *See id.* at 1263; *Stevenson v. TRW, Inc.*, 987 F.2d 288, 293-94 (5th Cir. 1993).

The Fifth Circuit has held that "only defendants who engaged in willful misrepresentations or concealments have committed a willful violation." *Stevenson*, 987 F.2d at (Cite as: 7 F. Supp. 2d 1056, *1080) 294. The Third Circuit, while declining to adopt this holding, did hold that "to justify an award of punitive damages, a defendant's actions must be on the same order as willful concealments or misrepresentations." *Cushman v. Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir.1997).

1. Trans Union's Motion

As described above, a jury could reasonably conclude that listing the Dillard's inquiry on Plaintiff's credit report was inaccurate, and possibly in violation of Trans Union's duty to reinvestigate. Further, as also discussed above, the FCRA did not require such disclosures to be made to creditors; only to the consumer herself. *See* 15 U.S.C. § 1681g(a). This Court finds that a jury could also reasonably conclude that listing the Dillard's inquiry on Plaintiff's credit report, especially after conclusively determining that the inquiry was generated by the Imposter, was an act knowingly and intentionally done in conscious disregard for Plaintiff's rights. Such a finding would permit an award of punitive damages under § 1681n; accordingly, Trans Unions Motion for Partial Summary Judgment on this issue is DENIED.

Since the above is sufficient grounds for denying Trans Union's Motion, the Court need not address whether Plaintiff may be entitled to recover punitive damages from Trans Union under other grounds. However, some of the discussion below on TRW's Motion for Partial Summary Judgment on Plaintiff's punitive damage request is also applicable to Trans Union.

2. TRW's Motion

TRW's Motion for Partial Summary Judgment on the punitive damages issue presents a closer call. Plaintiff's Opposition on this issue can be broken down into two arguments:[26] that TRW reported two of the Imposter's collection accounts on Plaintiff's report after the Imposter's activities came to light, and that TRW made conscious business decisions regarding its procedures despite knowledge of the growing problem of identity fraud.

Plaintiff's first argument is based on a March 26, 1996, "Merged Profile Report" by Strategic Mortgage Services which indicates that TRW reported Plaintiff had two accounts which had gone to collections. (*See* TRW May Decl. Ex. Q at 191.) This report indicated that TRW reported one of these accounts in October 1995, and another in July 1995. (*Id.*) Both reports were made after TRW became aware of Plaintiff's Imposter problem in June 1995.

Although Plaintiff argues that TRW reported these two accounts "for its own customers' preferences," (TRW Opp. at 33-34), this Court is hard-pressed to understand why any of TRW's customers would prefer to receive erroneous information. Plaintiff points to no evidence that she had informed TRW that these two collections accounts belonged to the Imposter, nor did Plaintiff allege any reinvestigation claim against TRW. The appearance of these erroneous accounts on Plaintiff's report may indicate TRW's negligence, but they do not support Plaintiff's claim of willfulness. *See Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir. 1996) (finding no genuine issue of material fact as to willfulness, despite the defendant's failure to correct the reappearance of deleted erroneous information after being told of it).

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[26] A third argument, that Plaintiff's § 1681e(a) "disclosure" claim supports punitive damages needs not be considered in light of this Court's determination that TRW's disclosures did not violate § 1681e(a).

Plaintiff also argues that TRW made conscious decisions about how to run its business, and that choosing to program its computers in the way it did, coupled with TRW's awareness of the growing problem of identity fraud, constitutes willful noncompliance with the FCRA, supporting punitive damages. Plaintiff argues that TRW elected to market separate products to combat fraud[27] at an additional fee, rather than use its limited computer capacity[28] to improve accuracy in its ordinary credit reporting system. (*See* TRW Opp. at 34.)

There are several problems with this theory. First, the evidence of "optional" products is taken from Experian's Internet site on November 6, 1997. (TRW May Decl. Ex. 10.) The events relevant to this case took place more than two years prior to that. Plaintiff does not point to evidence showing that TRW offered the same services during the relevant time period. Far more importantly, however, Plaintiff fails to substantiate the connection between these optional products and any

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[27] Plaintiff provides Experian's "product catalog" from its Internet site, which details various products/services available. (*See* TRW May Decl. Ex. 10.)

[28] Plaintiff presents deposition testimony by Helen McMillan, a "subteam leader of the database architect effort" at TRW, stating that it was not a "normal operation to have excess [computer] capacity in the data center" during the pertinent years, and that she was not aware of any time when TRW's Legacy system was in place that there was substantial excess capacity in the computer system. (TRW May Decl. Ex. U. (McMillan Depo.) at 135.)

deficiencies in TRW's operation constituting a violation of the FCRA.

Even accepting Plaintiff's contentions that TRW offered these services, and that TRW's computer system ran at full capacity, there is no showing that this represents a knowing and intentional act in conscious disregard for the rights of others. *Pinner*, 805 F.2d at 1263; *Stevenson*, 987 F.2d at 293-94. TRW's computers had sufficient capacity to do what they were asked to do. In turn, TRW programmed the computers to perform in a manner which TRW presumably believed to be consistent with the dictates of the FCRA. TRW may well have been wrong about its procedures being in compliance with the FCRA. Indeed, TRW may well have been negligent. But Plaintiff fails to produce evidence that TRW acted in conscious disregard for anyone's rights.

Under Plaintiff's theory, because TRW "intentionally" programmed its computers the way it did, then any FCRA violations occurring as a result of this intentional action are willful, and subject to liability for punitive damages. But this argument turns all FCRA violations involving impostors into willful violations, since every consumer reporting agency makes intentional choices about how to program its system. Willfulness requires more. Plaintiff has produced no evidence that TRW's actions constituted willful concealments or misrepresentations, *see Stevenson*, 987 F.2d at 294, or were on the same order as willful concealments or misrepresentations, *see Cushman*, 115 F.3d at 227, or were otherwise in conscious disregard for Plaintiff's rights, *see Pinner*, 805 F.2d at 1263.

For the above reasons, TRW's Motion for Partial Summary Judgment on the issue of punitive damages is GRANTED.

G. Plaintiff's Injunctive Relief Request

Plaintiff seeks injunctive relief against each Defendant, and each Defendant has moved for partial summary judgment on this request. Because the grounds relied on by each Defendant are different, the Court separately discusses each Defendant's Motion.

1. TRW's Motion

TRW points out that it is undisputed that as of September 19, 1996, it was no longer a consumer reporting agency, having transferred control and ownership of its credit reporting business to Experian. (TRW Genuine Issues ¶ 2; Goldston Decl. ¶ 3.) Nor does TRW have any plans to reenter the credit reporting business. (*Id.*) TRW then argues that this turn of events makes any request of injunctive relief against it moot. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (stating that case may be moot if the defendant can demonstrate that "there is no reasonable expectation that the wrong will be repeated"); *Snelling & Snelling, Inc. v. Armel, Inc.*, 360 F. Supp. 1319, 1321 (W.D.La.1973) (request for injunction to restrain violation of covenant not to compete need not be considered by the court where defendant had ceased business operations two years before).

Plaintiff argues that injunctive relief in this case is proper, because "courts sitting in equity may issue an injunction against a business that would pass to its successors or assigns." (TRW Opp. at 35.) Thus, the issue for this Court to decide is whether it could issue an injunction against TRW in this case which would bind Experian. The Rule governing injunctions states that:

> Every order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Fed. R. Civ. Proc. 65(d). Despite this seemingly clear command, Plaintiff is correct that under the right circumstances, injunctions may bind successors and assigns. *See Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

However, *Golden State* involved an injunction which issued before the assignment in question, and specifically held that "a bona fide purchaser, acquiring with knowledge that the wrong remains unremedied, . . . may be considered in privity with its predecessor for purposes of Rule 65(d)." *Id.* at 180 (emphasis added). This holding is unremarkable; a contrary result allowing a named party to avoid the effects of an injunction merely by transferring assets to a third party would provide an easy method of defying court orders. *See Herrlein v. Kanakis*, 526 F.2d 252, 255 (7th Cir. 1975).

The facts of the case at bar demonstrate that successor liability is unavailable. TRW transferred its credit reporting business on or before September 19, 1996. (TRW Genuine Issues ¶ 2.) Plaintiff filed her Complaint on October 21, 1996, more than month later. Therefore, not only had the injunction not yet been issued as of the time of the assignment, but the underlying litigation had not yet even commenced. Thus, there is no chance that TRW's assignment was an effort to defy a court order. *See Herrlein*, 526 F.2d at 255.

In essence, Plaintiff asks this Court to issue an injunction binding Experian should she prove that TRW violated the FCRA. Given the lack of notice to Experian at the time it took over TRW's business of this suit's pendency (since this suit had not yet been filed), such a process raises grave due process concerns. For example, TRW has little or no motivation to assure that the terms of any injunction ultimately issued are as minimally intrusive as necessary, since TRW itself is not affected by any such injunction. On the other hand, Experian, who would bear the brunt of the injunction under Plaintiff's theory, has no opportunity to participate in this litigation. The Supreme Court was careful to note in *Golden State* that the successor there was made a party to the proceedings, and as a result had a full opportunity to be heard. *See Golden State*, 414 U.S. at 180-81.

If Plaintiff wanted to obtain injunctive relief against Experian, she could have sought to join Experian as a defendant. *See Herrlein*, 526 F.2d at 255. There is evidence that Plaintiff's counsel were aware almost two years ago that TRW was transferring its credit reporting business to Experian. (McLoon Decl. ¶ 3.) In any event, this Court cannot enjoin Experian as TRW's successor, because there is no evidence that Experian had any knowledge of this suit at the time it acquired the business from TRW; indeed, this suit had not yet even been filed. And, since there is no justification for any injunction against TRW,[29] which itself is no longer covered by the FCRA, TRW's Motion for Partial Summary Judgment on this issue is GRANTED.

2. Trans Union's Motion

Trans Union, which is still in the credit reporting business, necessarily relies on different arguments than TRW in asserting that Plaintiff is not entitled to injunctive relief. Essentially, Trans Union makes two arguments: that Plaintiff has not stated her requested relief in specific enough terms, and that individual plaintiffs are not entitled to injunctive relief. These will be addressed in turn.

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[29] *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260 (9th Cir. 1998) is not to the contrary. In that case, the defendants had merely voluntarily ceased their conduct; the Ninth Circuit noted that the defendants offered no reason why they might not return to their unlawful conduct in the future. *Id.* at 1274. Moreover, in that case injunctive relief might have been necessary to remedy the effects on the plaintiffs of the unlawful conduct of defendants. *Id.* at 1275. In the case at bar, in contrast, it is undisputed that TRW fully repaired Plaintiff's credit file, deleting all reference to the Imposter's activities. Thus, this is not a case where a court order might be appropriate to order changes made to Plaintiff's file (at least as against TRW).

a. Specificity of any Injunctive Relief Granted

Trans Union argues that Plaintiff has failed to "state her proposed request for relief in 'specific' terms, and 'reasonable detail,' " citing Federal Rule of Civil Procedure 65(b). (TU Motion at 26.) Rule 65(d) requires that "*every order granting an injunction* . . . shall be specific in terms; [and] shall describe in reasonable detail . . . the act or acts sought to be restrained . . ." Fed. R. Civ. Proc. 65(d) (emphasis added).

Initially, it must be observed that this rule does not state that "oppositions to motions for summary judgement shall be specific in terms. . . ." Trans Union cites no authority for its implied proposition that Plaintiff has any burden at this stage of the litigation to articulate a proposed injunction. Nor has this Court located any. Rather, Trans Union's argument appears to this Court to be premature; should Plaintiff prevail at trial, and should this Court decide that injunctive relief was appropriate, then this Court would have the obligation to draft the appropriate order, considering the suggestions of Plaintiff and the opposition of Trans Union. Any difficulties in drafting such an order are better addressed at that time. The Court declines Trans Union's invitation to hold at this time that no matter what evidence is presented at trial, the Court will be unable to frame an appropriate order.

b. Is an Individual Plaintiff Entitled to Injunctive Relief?

Trans Union also argues that the "FCRA does not support an individual's claim for injunctive relief." (TU Motion at 26.) Initially it must be noted that Plaintiff also seeks injunctive relief under her state law claim. (Compl. ¶¶ 38-40.) Section 17204 permits members of the public acting as private attorney generals to seek injunctive relief on behalf of the public. Cal. Bus. & Prof. Code § 17204; *see also Stop Youth Addiction*, 17 Cal. 4th at 564, 71 Cal. Rptr. 2d 731, 950 P.2d 1086 (citing cases). This alone is enough to require Trans Union's Motion for Partial Summary Judgment on the issue of injunctive relief to be DENIED.

Whether or not the FCRA allows private litigants, as opposed to the Federal Trade Commission, to obtain injunctive relief broader than necessary to vindicate the individual plaintiff's rights, is a complicated question. Several district courts have held that the absence of any affirmative grant of equitable powers to individuals in the FCRA[30] bars broad "private attorney general" injunctive relief to individuals. *See Ditty v. Checkrite*, 973 F. Supp. 1320, 1338 (D. Utah. 1997); *Mangio v. Equifax, Inc.*, 887 F. Supp. 283 (S.D.Fla. 1995);[31] *Kekich v. Travelers Indem. Co.*, 64 F.R.D. 660 (E.D. Pa. 1974). In contrast, at least one case has allowed an individual to obtain such broad injunctive relief. *See Greenway v. Information Dynamics, Ltd.*, 399 F. Supp. 1092 (D. Ariz.1974), *aff'd*, 524 F.2d 1145 (9th Cir.1975).[32] Further complicating matters, several of these cases were class actions.

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[30] *Compare* 15 U.S.C. §§ 1681n, 1681o (creating liability for willful and negligent noncompliance, including damages, attorney's fees, and for willful noncompliance, punitive damages) *with* 15 U.S.C. § 1681s (giving equitable enforcement powers to the FTC).

[31] *Mangio* went further than the other two cases, *Ditty*, and *Kekich*, holding that the plaintiff in *Mangio*, suing over information in his credit report which actually pertained to another individual, could not obtain injunctive relief requiring the consumer reporting agency to remove the inaccurate information from his own file. *Mangio*, 887 F. Supp. at 284. The other two cases involved plaintiffs seeking broad injunctive relief affecting the public, not merely their own interests. *See Ditty*, 973 F. Supp. at 1338; *Kekich*, 64 F.R.D. at 667.

[32] The Ninth Circuit did not discuss the availability of broad injunctive relief to private litigants, but merely "adopt[ed] the careful reasoning of Judge Copple." *Greenway*, 524 F.2d at 1146. Likewise, the district court never discussed whether, and to what extent, injunctive relief was a remedy provided for by the FCRA.

However, this Court need not resolve this question of whether the FCRA allows an individual plaintiff to function as a private attorney general, because clearly § 17200 does, as described above. Thus, Plaintiff is entitled to seek such injunctive relief, regardless of whether she can seek it directly under the FCRA. Moreover, even if the FCRA does not allow injunctive relief on behalf of the public, this Court finds that it does allow injunctive relief on the plaintiff's own behalf.[33] As of September 12, 1996, Plaintiff's Trans Union report still listed the Dillard's inquiry. (*See* TU May Decl. Ex. K at 141.) The Court has not located a more recent copy of Plaintiff's credit report in the mass of evidence submitted, and it is unclear whether Trans Union's current file on Plaintiff indicates the Dillard's inquiry.[34] If it does, then Plaintiff may be entitled to an order requiring Trans Union to remove it.

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[33] Thus, this Court disagrees with *Mangio*, 887 F. Supp. at 284, which held that the plaintiff in that case could not even obtain injunctive relief requiring the consumer reporting agency to remove the inaccurate information from his own file. This result, based on cases interpreting the Fair Debt Collection practices Act ("FDCPA"), makes little sense. Moreover, it fails to recognize differences between the FDCPA and the FCRA, and it fails to consider the purpose of the FCRA. *See Guimond*, 45 F.3d at 1333 (the FCRA was crafted to protect consumers from the transmission of inaccurate information about them and to establish credit reporting practices utilizing accurate, relevant, and current information; to accomplish these goals the FCRA should be liberally interpreted). Additionally, *Mangio* ignores Supreme Court precedent. *See Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) ("absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction"). The FCRA contains no "clear command" that injunctive relief is unavailable; consequently, it is available. Whether or not it is available on behalf of the public at large, however, is a question of standing that the Court need not resolve, as discussed above.

For the above reasons, this Court DENIES Trans Union's Motion for Partial Summary Judgment on the injunctive relief issue.

VI. Conclusion

For the foregoing reasons, the Court hereby orders that:

Defendant Trans Union's Motion for Summary Judgment is GRANTED in part and DENIED in part as follows: Defendant Trans Union's Motion on Plaintiff's improper disclosure (§ 1681e(a)) claim is GRANTED. Defendant Trans Union's Motion on Plaintiff's accuracy (§ 1681e(b)) claim, reinvestigation (§ 1681i(a)) claim, state law (§ 17200) claim, request for punitive damages, and request for injunctive relief is DENIED.

Defendant TRW's Motion for Partial Summary Judgment is GRANTED in all respects, including Plaintiff's improper disclosure (§ 1681e(a)) claim, request for punitive damages, and request for injunctive relief. Additionally, Defendant TRW's Motion for Summary Adjudication that Plaintiff did not incur any economic damages in the form of higher interest expenses relating to TRW's furnishing her credit report to Chase is likewise GRANTED.

IT IS SO ORDERED.

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[34] Although the credit report states that inquiries remain on the report for two years, which suggests that the Dillard's inquiry is long gone, the Court has found no evidence that the Dillard's inquiry is in fact no longer listed.

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15 U.S.C.A. §1681

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 41—CONSUMER CREDIT PROTECTION
SUBCHAPTER III—CREDIT REPORTING AGENCIES

§ 1681. Congressional findings and statement of purpose

(a) Accuracy and fairness of credit reporting

The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) Reasonable procedures

It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

15 U.S.C.A. §1681b

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 41—CONSUMER CREDIT PROTECTION
SUBCHAPTER III—CREDIT REPORTING AGENCIES

1681b. Permissible purposes of consumer reports

(a) In general.—Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe—

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the information—

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that—

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;

(B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);

(C) the person has provided at least 10 days' prior notice to the consumer whose report is requested, by certified or registered mail to the last known address of the consumer, that the report will be requested; and

(D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under section 654 of Title 42 for use to set an initial or modified child support award.

* * *

15 U.S.C.A. §1681e

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 41—CONSUMER CREDIT PROTECTION
SUBCHAPTER III—CREDIT REPORTING AGENCIES

§ 1681e. Compliance procedures

(a) Identity and purposes of credit users

Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

(b) Accuracy of report

Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

* * *

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15 U.S.C.A. § 1681g

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 41—CONSUMER CREDIT PROTECTION
SUBCHAPTER III—CREDIT REPORTING AGENCIES

§ 1681g. Disclosures to consumers

(a) Information on file; sources; report recipients

Every consumer reporting agency shall, upon request, and subject to section 1681h(a)(1) of this title, clearly and accurately disclose to the consumer:

(1) All information in the consumer's file at the time of the request, except that nothing in this paragraph shall be construed to require a consumer reporting agency to disclose to a consumer any information concerning credit scores or any other risk scores or predictors relating to the consumer.

(2) The sources of the information; except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed: Provided, That in the event an action is brought under this subchapter, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

(3)(A) Identification of each person (including each end-user identified under section 1681e(e)(1) of this title) that procured a consumer report—

(i) for employment purposes, during the 2-year period preceding the date on which the request is made; or

(ii) for any other purpose, during the 1-year period preceding the date on which the request is made.

(B) An identification of a person under subparagraph (A) shall include—

(i) the name of the person or, if applicable, the trade name (written in full) under which such person conducts business; and

(ii) upon request of the consumer, the address and telephone number of the person.

(C) Subparagraph (A) does not apply if—

(i) the end user is an agency or department of the United States Government that procures the report from the person for purposes of determining the eligibility of the consumer to whom the report relates to receive access or continued access to classified information (as defined in section 1681b(b)(4)(E)(i) of this title); and

(ii) the head of the agency or department makes a written finding as prescribed under section 1681b(b)(4)(A) of this title.

(4) The dates, original payees, and amounts of any checks upon which is based any adverse characterization of the consumer, included in the file at the time of the disclosure.

(5) A record of all inquiries received by the agency during the 1-year period preceding the request that identified the consumer in connection with a credit or insurance transaction that was not initiated by the consumer.

(b) Exempt information

The requirements of subsection (a) of this section respecting the disclosure of sources of information and the recipients of consumer reports do not apply to information received or consumer reports furnished prior to the effective date of this subchapter except to the extent that the matter involved is contained in the files of the consumer reporting agency on that date.

(c) Summary of rights required to be included with disclosure

(1) Summary of rights.—A consumer reporting agency shall provide to a consumer, with each written disclosure by the agency to the consumer under this section—

(A) a written summary of all of the rights that the consumer has under this subchapter; and

(B) in the case of a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis, a toll-free telephone number established by the agency, at which personnel are accessible to consumers during normal business hours.

(2) Specific items required to be included.—The summary of rights required under paragraph (1) shall include—

(A) a brief description of this subchapter and all rights of consumers under this subchapter;

(B) an explanation of how the consumer may exercise the rights of the consumer under this subchapter;

(C) a list of all Federal agencies responsible for enforcing any provision of this subchapter and the address and any appropriate phone number of each such agency, in a form that will assist the consumer in selecting the appropriate agency;

(D) a statement that the consumer may have additional rights under State law and that the consumer may wish to contact a State or local consumer protection agency or a State attorney general to learn of those rights; and

(E) a statement that a consumer reporting agency is not required to remove accurate derogatory information from a consumer's file, unless the information is outdated under section 1681c of this title or cannot be verified.

(3) Form of summary of rights.—For purposes of this subsection and any disclosure by a consumer reporting agency required under this subchapter with respect to consumers' rights, the Federal Trade Commission (after consultation with each Federal agency referred to in section 1681s(b) of this title) shall prescribe the form and content of any such disclosure of the rights of consumers required under this subchapter. A consumer reporting agency shall be in compliance with this subsection if it provides disclosures under paragraph (1) that are substantially similar to the Federal Trade Commission prescription under this paragraph.

(4) Effectiveness.—No disclosures shall be required under this subsection until the date on which the Federal Trade Commission prescribes the form and content of such disclosures under paragraph (3).

15 U.S.C.A. § 1681m

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 41—CONSUMER CREDIT PROTECTION
SUBCHAPTER III—CREDIT REPORTING AGENCIES

§ 1681m. Requirements on users of consumer reports

(a) Duties of users taking adverse actions on the basis of information contained in consumer reports

If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall—

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically—

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right—

(A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

* * *

15 U.S.C.A. § 1681n

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 41—CONSUMER CREDIT PROTECTION
SUBCHAPTER III—CREDIT REPORTING AGENCIES

§ 1681n. Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) (A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

15 U.S.C.A. § 1681o

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 41—CONSUMER CREDIT PROTECTION
SUBCHAPTER III—CREDIT REPORTING AGENCIES

§ 1681o. Civil liability for negligent noncompliance

(a) In general.

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

5 U.S.C.A. §552a

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I—THE AGENCIES GENERALLY
CHAPTER 5—ADMINISTRATIVE PROCEDURE
SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

§ 552a. Records maintained on individuals

* * *

(g) Civil remedies.—Whenever any agency

* * *

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

* * *

Supreme Court, U.S.
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No. 00-1045

IN THE

Supreme Court of the United States

TRW, INC.,

Petitioner,

v.

ADELAIDE ANDREWS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Any suit to enforce the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA") must normally be brought "within two years from the date on which *liability arises*." 15 U.S.C. § 1681p [Section 618] (emphasis added). Section 618 also contains an express exception that mandates estoppel, whenever applicable, and thus may affect the running of the statute. *See id.* The "misrepresentation exception" applies only in the rare case where a reporting agency compounds its original FCRA liability by defrauding a consumer who makes an inquiry as of statutory right. *See id., see also* 15 U.S.C. § 1681g (setting forth consumers' statutory right to certain information). If the exception applies, the two-year limitations period begins entirely anew when the consumer discovers the falsity of the reporting agency's intervening fraud. 15 U.S.C. § 1681p.

Below, the Ninth Circuit Court of Appeals held that the general provision of Section 618 (*i.e.*, that a cause of action may be brought within two years of when it first *arises*), accommodates the "injury discovery rule." Accordingly, the Ninth Circuit ruled that the limitations period in this case did not begin to run until Plaintiff first discovered any injury that was caused by TRW. Petitioner maintains, however, that Section 618's general provision should be read as a statute of repose, pursuant to which the two-year limitations period would begin immediately whenever TRW breached a duty — regardless of any injury or its discovery. Thus, the legal question presented here is:

> Whether Section 618's general provision is a statute of repose; or whether it instead is a statute of limitations, which allows a plaintiff to bring suit within two years of the date on which her cause of action arises or within two years of the date on which it is discovered.

PARTIES TO THE PROCEEDINGS

The Petition sets forth Petitioner, TRW Inc., as the sole party to the proceedings. *See* Pet. at ii. Two additional parties warrant mention. The most important is Respondent Adelaide Andrews, who was the plaintiff and appellant below. Ms. Andrews is a resident of the State of California and a citizen of the United States of America.

In addition, Trans Union Corporation (later renamed and/or reestablished as Trans Union LLC, and hereinafter "Trans Union") was an original defendant below. *See* Pet., App. 10a. Trans Union settled following a partial summary judgment ruling providing that Respondent's claim for punitive damages against it could proceed to trial. *See* Pet., App. 54a. Thus, Trans Union was not a party to the appeal below and is not a party to these further proceedings.

Trans Union filed an *amicus curiae* brief in the Ninth Circuit Court of Appeals below, however, and has requested and received Respondent's consent to file an *amicus curiae* brief herein in support of the instant Petition, joined by other credit reporting agencies and their industry association.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Cited Authorities vi

Statutes Involved 1

Corrections and Additions to Statement of Facts .. 2

Reasons for Denying the Writ 8

I. TRW Ignores Distinctions Between Statutes Of Repose And Statutes Of Limitations, And Among The Injury Occurrence Rule, The Injury Discovery Rule, Equitable Tolling And Equitable Estoppel, Which Are Key To Interpreting Section 618. 8

II. For At Least 170 Years, This Court Has Consistently Applied The Discovery Rule To All Amenable Statutes Of Limitations. 10

III. When Congress Enacted FCRA In 1970, It Deliberately Rejected A Statute Of Repose In Favor Of A Statute Of Limitations, To Which It Added The Estoppel Provision. .. 15

Contents

Page

A. Considered in isolation, the plain language of Section 618 specifies a statute of limitations (not a statute of repose), to which is added a special exception that mandates application of estoppel when warranted. 15

B. The statutory context of Section 618 further indicates that it is a statute of limitations (not a statute of repose), to which is added the estoppel provision. 18

C. FCRA's legislative history reveals that Congress eschewed both a two-year and a five-year statute of repose in favor of the two-year statute of limitations coupled with the "misrepresentation exception." 20

IV. Notwithstanding Plain Error By The Third, Seventh, Tenth And Eleventh Circuits Courts In Their Consideration Of Section 618, The Judicial Trend Favors Interpretation Of It As A Statute Of Limitations, Not Of Repose. ... 22

A. The Third, Seventh, Tenth and Eleventh Circuits erroneously concluded that interpreting Section 618's general rule as a statute of limitations is incompatible with the estoppel provision. 22

Contents

Page

B. Several circuit courts of appeals have interpreted a statute that is virtually identical to Section 618 as a statute of limitations, coupled with the estoppel exception. 25

C. The Fifth and Ninth Circuits each properly interpreted Section 618 as a statute of limitations, coupled with an estoppel exception. 27

D. Even before the Ninth Circuit ruled as it did below, the judicial trend toward recognition of Section 618 as a statute of limitations was developing as it should. 29

Conclusion 30

Appendix — Relevant Statutes 1a

TABLE OF CITED AUTHORITIES

Page

Cases:

Aldrich v. McCollough Properties, Inc., 627 F.2d 1036 (10th Cir. 1980) 14

Allen v. Equifax Credit Info. Services, Inc., 46 F.3d 1138, 1995 WL 21422 (9th Cir. Jan. 11, 1995) 24, 25

Amy v. City of Watertown, 130 U.S. 320 (1889) . . . 11, 12

Andrus v. Glover Constr. Co., 446 U.S. 608 (1980) 24

Bailey v. Glover, 88 U.S. (21 Wall) 342 (1874) . . . 12, 13

Ben-Hur v. Equifax Info. Serv., Inc., 976 F. Supp. 795 (E.D. Wis. 1997) 7

Bergman v. United States, 751 F.2d 314 (10th Cir. 1984) 26

Bowyer v. U.S. Dept. of Air Force, 875 F.2d 632 (7th Cir. 1989) 26

Bradway v. American Nat'l Red Cross, 992 F.2d 298 (11th Cir. 1993) 8

Burnett v. New York Central R.R. Co., 380 U.S. 424 (1965) 26

Page

Cada v. Baxter Healthcare Corp., 920 F.2d 446 (7th Cir. 1990) 9, 10, 17, 23

Clark v. State Farm Fire and Cas. Ins. Co., 54 F.3d 669 (10th Cir. 1995) 6, 7, 24, 26

Clay v. Equifax, Inc., 762 F.2d 952 (11th Cir. 1985) 6, 7, 22, 24

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 15

Englerius v. Veterans Admin., 837 F.2d 895 (9th Cir. 1988) 27

Epstein v. United States, 174 F.2d 754 (6th Cir. 1949) 13

Ferguson v. Roberts, 11 F.3d 696 (7th Cir. 1993) . . . 14

Hardin v. City Title & Escrow Co., 797 F.2d 1037 (D.C. Cir. 1986) 17

Hinkle by Hinkle v. Henderson, 85 F.3d 298 (7th Cir. 1996) 8

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 10

Houghton v. Insurance Crime Prevention Inst., 795 F.2d 322 (3d Cir. 1986) 6, 7, 23, 24, 25, 28, 29

Page

Hubbard v. United States, 514 U.S. 695 (1995) . . . 16

Hyde v. Hyberia Nat'l Bank, 861 F.2d 446 (1988), *cert. denied sub nom Credit Bureau Services – New Orleans v. Hyde*, 491 U.S. 910 (1989) . . 7, 27, 28

In re Catapult Entertainment, Inc., 165 F.3d 747 (9th Cir. 1999) 18

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 22

Jordan v. Medley, 711 F.2d 211 (D.C. Cir. 1983) . . . 6

Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) . . 9

Lampf, Pleva, Lipkind, et al. v. Gilbertson, 501 U.S. 350 (1991) 14, 25

McAnly v. Middleton & Reutlinger, P.S.C., 77 F. Supp. 2d 810 (W.D. Ky. 1999) 7, 24, 29

Moore v. Crawford, 130 U.S. 122 (1889) 12

Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359 (1980) 22

Norgart v. Upjohn Co., 21 Cal. 4th 383 (1999) . . . 14

Rotella v. Wood, 120 S. Ct. 1075 (February 23, 2000) 9, 13, 16, 25

Page

Russell v. Southard, 53 U.S. 139 (1851) 2

Rylewicz v. Beaton Serv., Ltd., 888 F.2d 1175 (7th Cir. 1989) 6, 7, 23, 24, 25, 26

Stuart v. American Cyanamid Co., 158 F.3d 622 (2d Cir. 1998) 14

Tijerina v. Walters, 821 F.2d 789 (D.C. Cir. 1987) 25, 26, 27

United States v. Gilbert, 136 F.3d 1451 (11th Cir. 1998) 14

United States v. Habig, 390 U.S. 222 (1968) 14

United States v. Marion, 404 U.S. 307 (1971) 14

United States v. Phillips, 843 F.2d 438 (11th Cir. 1988) 14

Willison v. Watkins, 28 U.S. (3 Pet.) 43 (1830) . . . 11

Wright v. Robinson, 426 S.E.2d 870 (Ga. 1993) . . . 8

Statutes:

5 U.S.C. § 552a(g)(5) 17, 25

15 U.S.C. § 168b(3)(A) 13

Page

15 U.S.C. § 1640(e) 16, 17

15 U.S.C. § 1681 *et seq.* i

15 U.S.C. § 1681(a)(4) 12

15 U.S.C. § 1681(b) 1, 5, 12

15 U.S.C. § 1681b(a) 1

15 U.S.C. § 1681e 1

15 U.S.C. § 1681e(a) 5, 13

15 U.S.C. § 1681e(b) 5

15 U.S.C. § 1681g .... i, 1, 10, 19

15 U.S.C. § 1681m 1, 20, 28

15 U.S.C. § 1681n 1

15 U.S.C. § 1681o 1, 19

15 U.S.C. § 1681p .... *passim*

19 U.S.C. § 1621 10

42 U.S.C. § 9613(g) 10

Page

Act Aug. 5, 1935, c. 438, Title III, § 306, 49 Stat. 527 10

Pub. L. No. 90-321, Title I, § 130(e), 82 Stat. 146 (1968) 17

Pub. L. No. 91-508, § 604, 84 Stat. 1136 (Oct. 26, 1970) 1

Pub. L. No. 93-579, § 2, 88 Stat. 1896 (1974) 17, 25

Pub. L. No. 99-499, § 113(b), 100 Stat. 1767 (Oct. 17, 1986) 11

Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) 1

Rule:

Fed. R. Civ. P. 61 6

Other Authorities:

Black's Law Dictionary 661 (6th ed. 1990) 12

Martha F. Davis, *Solving Statute of Limitations Problems Under the Fair Credit Reporting Act*, 18 Ind. L. Rev. 507 (1985) 23

H.R. 14765 21

H.R. 16340 21

	Page
1 Story, Eq. Jur. § 187	12
1 The Oxford English Dictionary 629 (2d ed. 1989)	16
115 Cong. Rec. 2415-16 (Jan. 31, 1969)	20
115 Cong. Rec. 33824 (Nov. 12, 1969)	21
116 Cong. Rec. 6200-01 (Mar. 5, 1970)	21
116 Cong. Rec. 32638 (Sept. 18, 1970)	21
116 Cong. Rec. 32641 (Sept. 18, 1970)	20
116 Cong. Rec. 36573 (Oct. 13, 1970)	21
116 Cong. Rec. 36576 (Oct. 18, 1970)	21
2 Calvin W. Corman, Limitations of Action § 9.7.2 (1991)	14
2A Norman J. Singer, Sutherland Statutory Construction § 46.06 (5th ed. 1992)	19

Respondent Adelaide Andrews respectfully asks this Court to deny the petition for writ of certiorari seeking review of one facet of the Ninth Circuit Court of Appeals' opinion below.

STATUTES INVOLVED

Most of the statutes that Petitioner ("TRW") reprinted and attached as an appendix to the Petition do not reflect the Fair Credit Reporting Act ("FCRA") as it was effective during the time frame relevant to this action. Instead, TRW provided statutes reflecting certain FCRA amendments that became effective on September 30, 1997 — almost a year after Respondent brought her suit below. *Compare* Pet., App. at 3a (indicating that Respondent filed her action below on Oct. 21, 1996), *with* the Consumer Credit Reporting Act of 1996, part of the Omnibus Consolidated Appropriations Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) (providing in Section 2404 thereof that Sept. 30, 1997 is the effective date of amendments).[1]

All of the FCRA provisions that TRW reprinted at Pet., App. at 67a-79a, reflect such anachronistic statutory language. Respondent therefore urges this Court to refer instead to the appendix that she provides herewith, which contains the relevant language of 15 U.S.C. §§ 1681b, 1681e, 1681g, 1681m, 1681n and 1681o as they were in effect during the relevant time frame. All references herein to these particular statutes refer to the statutes provided herewith.

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[1] For example, TRW presents 15 U.S.C. § 1681b(a) as it was enacted in 1996, to become effective in 1997. *See* Pet., App. 67a-69a (15 U.S.C. § 1681b(a) as presented by TRW). *But see* Pub. L. No. 91-508, § 604, 84 Stat. 1136 (Oct. 26, 1970) (the corollary statute as it was originally enacted in 1970 and was in effect during the time frame relevant to this case).

CORRECTIONS AND ADDITIONS TO STATEMENT OF FACTS

Although Respondent disputes TRW's characterizations of many facts, Respondent addresses herein only TRW's most serious omissions and misstatements.

First, TRW presents to this Court many facts that are neither record facts nor recent developments permissible for citation pursuant to this Court's Rule 25(5). *See, e.g.*, Pet. at 15-16 (citations to various Internet web-sites visited), *see also Russell v. Southard*, 53 U.S. 139, 158-59 (1851) ("This court must affirm or reverse upon the case as it appears in the record."). Instead, TRW represents facts that were never marshaled below and are plainly belied by the facts of record below.[2]

Second, concerning TRW's characterization of facts of record, TRW reports that an impostor named *Andrea* Andrews misused Respondent *Adelaide* Andrews' social security number when applying for credit and various other benefits. Concerning such events and their fallout, Respondent provides the following corrections and additions:

1. TRW suggests that it never issued any credit reports concerning Respondent which resulted in credit being issued to the impostor. Pet. at 5. This suggestion is incorrect. TRW issued a credit report to Prime Cable of Las Vegas, which in turn issued a cable television account on credit to the impostor.[3] The Prime Cable credit account grew delinquent (due to non-payment in arrears), and — as is typical in cases of "identity theft" — the creditor sold the delinquent account to collection agents, who eventually dunned Respondent for payment of the impostor's bills. *See* Pet., App. at 3a.

2. During the decade of the 1990s, incidents of identity theft rose sharply throughout the nation. "Identity theft" occurs when an impostor utilizes some portion of a creditworthy consumer's identifying indicia to seek and obtain credit based upon the creditworthy consumer's credit record. The unwitting, innocent consumer whose good credit record is thus misused is typically saddled with the impostor's credit delinquencies, denied further credit, and harassed by credit collection agents.

3. Reporting agencies such as TRW,[4] Equifax and Trans Union have been at the heart of the "identity theft" problem. They have frequently released confidential records about creditworthy consumers without reasonable grounds for doing so, and thereby facilitated identity theft. Indeed, reporting agencies routinely — but unreasonably — disclose consumers' confidential credit records in response to subscribers' inquiries based only on minimally "matching" credit

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[2] For example, TRW falsely suggests that reporting agencies would be severely over-burdened if asked to retain historical data for longer than two years. *See* Pet. at 16. The record evidence shows, to the contrary, that reporting agencies retain data beyond two years, and could retain all electronic data for many years at minimal cost.

[3] TRW argues that, because Prime Cable of Las Vegas is a regulated utility required by law to provide cable television services to all consumers within its geographic area, it issued no credit to the (Cont'd)

(Cont'd)
impostor. *See* Pet., App. at 17a-18a n.4. This logic is flawed because Prime Cable of Las Vegas — as is typical of public utilities — would have exacted an up-front cash deposit from the impostor had TRW not improperly disclosed Respondent's good credit record. Hence, the impostor obtained the cable services on undeserved credit, with payment due in arrears.

[4] Since late 1996, TRW's former credit reporting business has continued operating *sub nom* "Experian" following the divestiture by TRW of its credit reporting division to its credit reporting managers and new investors.

applications submitted by impostors. *See, e.g.*, Pet., App. at 17a (district court below reciting subscribers' inquiries reflecting the impostor's distinguishable identifying indicia, with the exception of Respondent's social security number, and a shared last name and first initial). The epidemic of identity theft has recently grown so prevalent that reporting agencies — acting as the hubs, repositories and supposed guardians of personal credit information — facilitate identity theft in hundreds of thousands of cases annually.

4. TRW is alleged to have willfully and negligently breached Respondent's statutory privacy rights on four separate occasions. *See id.* Two of the privacy breaches occurred within two years preceding the filing of this action. *See* Pet., App. at 11a, 17a. The other two privacy breaches occurred within three months of each other, just slightly longer than two years prior to the filing of this action. *See* Pet., App. at 23a. Importantly, all injury to Respondent from these four privacy breaches occurred and was discovered by Respondent within two years preceding the filing of her action. *See* Pet., App. at 18a.

5. TRW mischaracterizes aspects of the summary judgment proceedings below. For example, TRW suggests that its co-defendant, Trans Union, did not move for summary judgment. *See* Pet. at 7. In fact, Trans Union moved for summary judgment when TRW moved for partial summary judgment, but Trans Union achieved less success. *See* Pet., App. at 10a-11a. Trans Union thereafter settled with Respondent before trial, due partly to the fact that Respondent's claim for punitive damages against Trans Union (based upon alleged willful violations of FCRA) survived its summary judgment motion. *See* Pet., App. at 54a.

6. TRW also represents that it "moved for summary judgment, and the district court granted partial summary judgment. . . ." Pet. at 7. This is incorrect as well. TRW moved only for partial summary judgment. It never contested that the evidence indicated a genuine issue of material fact concerning TRW's alleged non-compliance with the FCRA's credit reporting "accuracy" requirements (set forth in 15 U.S.C. § 1681e(b)). *See* Pet., App. at 35a and 64a. TRW's partial summary judgment motion sought, *inter alia*, to set aside Respondent's claims concerning TRW's alleged violations of 15 U.S.C. §§ 1681b and 1681e(a) (*i.e.*, her "privacy" claim), as well as her claims for punitive damages for allegedly willful violation of FCRA. *See* Pet., App. at 3a, 21a-34a, 48a-51a, 55a-57a. The district court granted TRW's motion for partial summary judgment in its entirety. Pet., App. at 64a. Two-and-one-half years later, the Ninth Circuit reversed. *See* Pet., App. at 2a ("[W]e reverse the summary judgments awarded TRW. . . .").

7. TRW failed to note that the Ninth Circuit, when it restored Respondent's claim regarding TRW's alleged breaches of her privacy rights, also restored her claim for punitive damages with respect thereto. Specifically, based on its review of the record before it, the Ninth Circuit concluded as follows: "We reinstate the Plaintiff's [privacy] claim *together with her request for punitive damages based upon it*." Pet., App. at 8a (emphasis added). The Ninth Circuit thus recognized that the record evidence marshaled in response to the motion presented a genuine issue of material fact concerning whether TRW's privacy breaches were willful, warranting punitive damages. TRW does not challenge that ruling.

8. TRW correctly indicates that Respondent's "accuracy" claim (concerning which TRW did not move for summary judgment) progressed to trial after the partial summary judgments and resulted in a jury verdict favoring TRW. Pet. at 7. TRW ignores, however, the impacts that the erroneous partial summary judgments had on the prosecution of the thereafter-orphaned claim. Indeed, on appeal, the Ninth Circuit ruled that the trial court's "legal error" had further "infected" pre-trial rulings concerning the admissibility of certain critical trial testimony. *See* Pet., App. at 8a-9a. Unfortunately, the Ninth Circuit then deemed all such error "harmless" as it related to the trial of the "accuracy" claim, and declined to reverse the district court's judgment based thereon. *See* Pet., App. at 9a. *But see, e.g., Jordan v. Medley*, 711 F.2d 211, 219 (D.C. Cir. 1983) (Scalia, J., analyzing Fed. R. Civ. P. 61 and finding no necessary assurance that jury's judgment was not substantially swayed by error). Respondent respectfully views this aspect of the Ninth Circuit's ruling to be erroneous under Fed. R. Civ. P. 61, but acquiesces to it.

Concerning TRW's characterization of the Ninth Circuit's treatment of Section 618, Respondent adds the following:

9. Between 1985 and 1995, five circuit courts of appeals interpreted Section 618, resulting in two conflicting interpretations. Specifically, in chronological order, the Eleventh, Third, Seventh and Tenth Circuits ruled that the normal provision of Section 618 should be read as a statute of repose. *See Clay v. Equifax, Inc.*, 762 F.2d 952, 960-61 (11th Cir. 1985); *Houghton v. Insurance Crime Prevention Inst.*, 795 F.2d 322, 324-25 (3d Cir. 1986); *Rylewicz v. Beaton Serv., Ltd.*, 888 F.2d 1175, 1181 (7th Cir. 1989) (following *Houghton*); *Clark v. State Farm Fire and Cas. Ins. Co.*, 54 F.3d 669, 670-72 (10th Cir. 1995) (following *Houghton* and *Rylewicz*).

10. TRW failed to apprise this Court that the Fifth Circuit, in *Hyde v. Hyberia Nat'l Bank*, 861 F.2d 446 (5th Cir. 1988), *cert. denied sub. nom. Credit Bureau Services - New Orleans v. Hyde*, 491 U.S. 910 (1989), broke from the short string of decisions that followed *Clay* and *Houghton* — and thus began a judicial trend of properly interpreting Section 618. Expressly rejecting *Houghton* (which interpreted Section 618 as a strict statute of repose), the Fifth Circuit held that the injury occurrence rule should be read into Section 618. *See id.* at 448-49. Specifically, it held that when a negligent violation of FCRA is alleged, the limitations period should commence running only when the injury to the consumer has occurred. *See id.* at 446, 448-49.

11. TRW suggests that issues concerning the FCRA statute of limitations are "frequently raised" in federal courts, citing twelve decisions in the last eight years. *See* Petition at 15 n.5 (citing primarily unpublished cases dating back to early 1993). Notably, outside of the Ninth Circuit (where the instant case has now established the law of that circuit), only two published federal cases in the last five years have addressed FCRA's statute of limitations. *Compare Ben-Hur v. Equifax Info. Serv., Inc.*, 976 F. Supp. 795, 801-02 (E.D. Wis. 1997) (following Seventh Circuit's analysis in *Rylewicz*), *with McAnly v. Middleton & Reutlinger, P.S.C.*, 77 F. Supp. 2d 810, 812-14 (W.D. Ky. 1999) (expressly declining to follow *Houghton* and its progeny, including *Rylewicz*, after giving them "considerable respect and attention," but finding them "unpersuasive").

REASONS FOR DENYING THE WRIT

I. TRW IGNORES DISTINCTIONS BETWEEN STATUTES OF REPOSE AND STATUTES OF LIMITATIONS, AND AMONG THE INJURY OCCURRENCE RULE, THE INJURY DISCOVERY RULE, EQUITABLE TOLLING AND EQUITABLE ESTOPPEL, WHICH ARE KEY TO INTERPRETING SECTION 618.

Key to any proper resolution of the legal question presented by the instant Petition is an appreciation of various legal concepts involving statutes of limitations and statutes of repose. Respondent maintains that Section 618's general provision should be interpreted as a statute of *limitations*, such that the two-year limitation began when her cause of action was complete and she discovered it. TRW argues to the contrary that the Section 618's general provision should be interpreted strictly as a statute of *repose*, such that a two-year time frame in which to bring an action commenced immediately upon each of TRW's wrongful acts (*i.e.*, breach of any statutory duty) — irrespective of the occurrence or discovery of any injury. A "statute of limitations" governs the time within which an action may be brought after the cause of action arises (or accrues); whereas a "statute of repose" strictly limits the time within which an action may be brought following a potential defendant's transgression or wrongdoing. *See, e.g.*, *Hinkle by Hinkle v. Henderson*, 85 F.3d 298, 301 (7th Cir. 1996) (discussing the distinction between statutes of limitations and repose); *Bradway v. American Nat'l Red Cross*, 992 F.2d 298, 300-01 (11th Cir. 1993), (quoting *Wright v. Robinson*, 426 S.E.2d 870, 871-72 (Ga. 1993)).

Also central to a proper resolution of the legal question here is an appreciation of the distinctions among the injury discovery rule, the injury occurrence rule, equitable tolling and equitable estoppel. The "injury discovery rule" operates to forestall the commencement of a limitations period until such

time as the potential plaintiff discovers, or by reasonable diligence should have discovered, that he or she has been injured by some wrongdoing. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990). The "injury occurrence rule," on the other hand, operates to forestall the commencement of a limitations period until an injury first occurs pursuant to some wrongdoing — irrespective of the plaintiff's discovery of the injury.[5] *See Rotella v. Wood*, 120 S. Ct. 1075, 1080 n.2 (February 23, 2000). Both of these "injury" rules address the question of when a limitations period first begins to run. *Id.* at 1079-80.

The two "injury" rules are themselves distinguishable from two tolling doctrines, "equitable tolling" and "equitable estoppel." Both operate to interrupt and extend a limitations period *after* it begins running. *See generally Cada*, 920 F.2d at 450 (distinguishing discovery rule, equitable tolling and equitable estoppel). The two tolling doctrines apply to different factual situations. "Equitable tolling" permits a belated suit

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[5] Justice Scalia, joined by Justice Thomas, has championed the "injury occurrence rule" as an alternative to the injury discovery rule in certain circumstances. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 196 *et seq.* (1997) (Scalia, J., concurring opinion). That view, however, seems largely based upon the argument that the Racketeer Influenced and Corrupt Organizations Act (RICO) should be construed consistently with and in light of similar constructions of the Clayton Act. *See id.* at 197-99. Moreover, Justice Scalia's opinion in *Klehr* argues for commencement of the RICO statute of limitations "when a defendant commits an act that injures a plaintiff's business." *Id.* at 198. Here, Respondent first discovered TRW's FCRA violations on the same day — May 31, 1995 — on which her own business interests were first injured by TRW's actions. Pet., App. at 18a (Respondent was present when her prospective creditor first obtained a problematic credit report reflecting inaccuracies and earlier privacy breaches). Thus, in this case, there should be no difference between application of the injury discovery rule, on the one hand, and application of the injury occurrence rule championed by Justice Scalia, on the other hand. Respondent therefore reads Justice Scalia's concurring opinion in *Klehr* (and the differences between the injury occurrence rule and the injury discovery rule) as academic to the proper resolution of this particular action.

(after a statute of limitations has been exhausted) if the plaintiff was unable to obtain vital information bearing on the existence of his claim despite the exercise of all due diligence and despite *no* concealment or obstruction on the potential defendant's part. *See id.* at 451. "Equitable estoppel," on the other hand, "comes into play if the defendant takes active steps to prevent the plaintiff from timely filing suit, as by, for example, promising to the plaintiff not to plead the statute of limitations." *Id.* at 450-51.[6] As will be explained herein, Section 618 is a statute of limitations, not of repose, to which Congress affixed a special provision codifying the judicial principle of equitable estoppel.

II. FOR AT LEAST 170 YEARS, THIS COURT HAS CONSISTENTLY APPLIED THE DISCOVERY RULE TO ALL AMENABLE STATUTES OF LIMITATIONS.

The "injury discovery rule" or discovery rule is presumptively imputed in all statutes of limitations. *See Cada*, 920 F.2d at 450. TRW argues, however, that Congress twice — first in 1935 and again in 1986 — enacted statutes that expressly called for application of the discovery rule. *See* Pet. at 14 n.3 (citing 19 U.S.C. § 1621 and 42 U.S.C. § 9613(g)).[7] TRW thus

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[6] For example, assume that a consumer is wronged by a reporting agency (*e.g.*, his privacy is negligently breached). Assume further that the violation eventually leads to some injury, which the consumer discovers, and, in the course of investigating his claim, makes an inquiry to the potential defendant. *See* 15 U.S.C. § 1681g (consumers' statutory right to information from reporting agencies). Assume also that the consumer is then actively defrauded by the defendant, which wants to obfuscate its liability. The principle of equitable estoppel could then be fittingly applied to toll the statute of limitations during the time that the consumer is misled by the defendant's fraud. *See Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946).

[7] The Tariff Act of 1930 was amended in 1935 to express the discovery rule. *See* Act Aug. 5, 1935, c. 438, Title III, § 306, 49 Stat. 527 (amendments to Tariff Act of 1930). In 1986, 42 U.S.C. § 9613(g)

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suggests that the discovery rule cannot be inferred when interpreting Section 618. The refusal to apply the discovery rule to Section 618 runs contrary to more than 170 years of this Court's precedent.

Since at least 1830, this Court has consistently applied the discovery rule to statutes of limitations concerning fraud of any kind. Thus, in *Willison v. Watkins*, 28 U.S. (3 Pet.) 43 (1830), Justice Baldwin observed:

> [T]he statute of limitations receives the same construction and application at law and in equity. It is equally said that fraud as well as trust are not within the statute, and it is well settled that the statute [of limitations] does not run until the discovery of the fraud. . . . But after the discovery of the fact imputed as fraud, the statute runs as in other cases. . . . By setting up . . . a title adverse to his landlord, the tenant [here] commits a fraud as much as by the breach of any other trust. Why then should not the statute [of limitations] protect him, as much as any other fraudulent trustee, from the time the fraud is discovered. . .?

Id. at 52-53 (citations and quotations omitted). This same cardinal principle was restated by this Court in *Amy v. City of Watertown*, 130 U.S. 320 (1889):

> The courts of equity, . . . from an early day, have held that where one person has been injured by the fraud of another, and the facts constituting the fraud do not come to the knowledge of the person injured until some time afterwards, the statute [of

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was added to the Comprehensive Environmental, response, Compensation, and Liability Act (CERCLA). *See* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 113(b), 100 Stat. 1767 (Oct. 17, 1986).

> limitations] will not commence to run until the discovery of those facts, or until by reason of diligence they might have been discovered.

Id. at 324.

Importantly, this Court understood at the time that "fraud" for such purposes was defined broadly: "Fraud, indeed, in the sense of the court of equity, properly includes all acts, omissions and concealments which may involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and by which an undue or unconscientious advantage is taken of another." *Moore v. Crawford*, 130 U.S. 122, 128 (1889) (quoting 1 Story, Eq. Jur. § 187).

In 1874, this Court specifically considered whether the discovery rule should apply to a "constructive fraud," such as the type of wrongdoing that TRW is alleged here to have perpetrated herein.[8] In *Bailey v. Glover*, 88 U.S. (21 Wall) 342

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[8] In this action, TRW is alleged to have perpetrated a constructive fraud against Respondent. "Constructive fraud consists in any act of commission or omission contrary to legal or equitable duty, trust or confidence justly reposed, which is contrary to good conscience and operates to the injury of another." Black's Law Dictionary 661 (6th ed. 1990); *accord id.* ("Actual fraud consists of deceit, artifice, trick, design and active operation of the mind; it includes cases of the intentional and successful employment of any cunning, deception, or artifice used to circumvent or cheat another. . . .").

By engaging in the business of consumer credit reporting, TRW voluntarily assumed a legal, fiduciary duty to safeguard reasonably all consumers' personal, confidential credit histories. *See* 15 U.S.C. § 1681(a)(4) ("There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy."); 15 U.S.C. § 1681(b) ("It is the purpose of [FCRA] to require that consumer reporting agencies meet the needs of commerce . . . in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the

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(1874), this Court considered whether the discovery rule should apply where a plaintiff's discovery of wrongdoing was delayed due to inherent latency, and not due to any active, intentional concealment or obstruction by the defendant. Justice Miller reviewed the precedents from England and the states of this nation, and thus concluded:

> [W]e hold that when there is no negligence or laches on the part of a plaintiff coming to knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, *or is of such character as to conceal itself*, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.

Id. at 349-50 (emphasis added).

On the basis of cases such as these, federal courts have long recognized that, unless the statute at hand explicitly forbids it, any statute of limitations will not begin to run until a plaintiff discovers or should have discovered an injury flowing from a constructive fraud. *Rotella*, 120 S. Ct. at 1081 ("Federal courts, to be sure, generally apply a discovery rule when a statute is silent on the issue. . . ."). This Court has been unwilling to read the discovery rule out of any statute of limitations unless the legislative mandate to do so is clear and unambiguous, or unless its application would be "*fundamentally inconsistent* with" the

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requirements of [FCRA]."); §§ 15 U.S.C. § 168b(3)(A) and 1681e(a). Given this, TRW's four alleged privacy breaches concerning Respondent would constitute constructive fraud. *See Epstein v. United States*, 174 F.2d 754, 765-66 (6th Cir. 1949) (distinguishing between actual and constructive fraud). "Constructive fraud is a breach of legal or equitable duty which, in spite of the fact that there is no moral guilt resulting from the breach of duty, the law declares fraudulent because of its tendency to . . . violate public or private confidences, or to injure public interests." *Id.* at 766.

legislative provisions. *Lampf, Pleva, Lipkind, et al. v. Gilbertson*, 501 U.S. 350, 363 (1991) (emphasis added);[9] *accord Aldrich v. McCollough Properties, Inc.*, 627 F.2d 1036, 1042-43 (10th Cir. 1980) (a strict statute of repose "uses strong and unambiguous terms"); *Stuart v. American Cyanamid Co.*, 158 F.3d 622, 628 (2d Cir. 1998) (noting "unambiguous language" in the statutes of repose, quoting 2 Calvin W. Corman, Limitations of Action § 9.7.2, at 72 (1991) ("Statutes of repose, unlike statutes of limitations, are drafted in absolute terms with the apparent legislative intent to preclude all forms of postponement of the accrual date of the cause of action.")); *Ferguson v. Roberts*, 11 F.3d 696, 705 (7th Cir. 1993) ("The legislative history in 1934 makes it pellucid that Congress included statutes of repose. . . ."). Thus, all civil statutes of limitations should be read to incorporate the discovery rule — unless Congress clearly intended them as statutes of repose.

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[9] Although this Court has ruled that *criminal* statutes of limitations are to be liberally construed in favor of repose, it has never so held concerning civil statutes. *See, e.g., United States v. Habig*, 390 U.S. 222, 227 (1968) (criminal limitations statutes are to be liberally construed in favor of repose). In dicta, the Eleventh Circuit has twice expressed the view that all statutes of limitations — criminal *and* civil — are to be liberally construed in favor of repose. *See United States v. Phillips*, 843 F.2d 438, 443 (11th Cir. 1988); *United States v. Gilbert*, 136 F.3d 1451, 1453 (11th Cir. 1998). The Eleventh Circuit's dicta are unfounded, however, and appear to be based upon a misinterpretation of dicta in *United States v. Marion*, 404 U.S. 307 (1971), wherein this Court noted that the "policies behind civil [and criminal] statutes of limitations are in many ways similar." *Id.* at 322 n.14; *see also Phillips*, 843 F.2d at 443. Concerning the interpretation of civil statutes of limitations, the California Supreme Court recently expressed the principle most consistent with this Court's precedent. *See Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 396 (1999) ("[T]he affirmative defense based on the statute of limitations should not be characterized by courts as either "favored" or "disfavored." The two public policies . . . — the one for repose and the other for disposition on the merits — are equally strong, the one being no less important or substantial than the other.").

III. WHEN CONGRESS ENACTED FCRA IN 1970, IT DELIBERATELY REJECTED A STATUTE OF REPOSE IN FAVOR OF A STATUTE OF LIMITATIONS, TO WHICH IT ADDED THE ESTOPPEL PROVISION.

The plain language of Section 618, its overall statutory context, and the legislative history all indicate that it should be interpreted as a statute of limitations (not a statute of repose), to which Congress added an estoppel provision.

A. Considered in isolation, the plain language of Section 618 specifies a statute of limitations (not a statute of repose), to which is added a special exception that mandates application of estoppel when warranted.

Whenever interpreting any statute, one must begin with the language of the statute itself. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). In attempting to present Section 618 as a strict statute of repose coupled with an equitable estoppel provision, TRW argues that "respondent filed her complaint more than two years after two of the alleged [TRW] violations, but did not allege any willful misrepresentation of information required to be disclosed to her [by TRW]." Pet. at 10. TRW thus asks this Court to rule that, absent a defendant's actual fraud concerning an inquiring consumer, FCRA's general limitations period would commence running when there is merely the breach of a statutory duty of care (*e.g.*, a privacy breach), *before* any tangible injury is caused thereby or discovered.

FCRA's statute of limitations, however, nowhere specifies that an action must be brought within two years following a violation of FCRA's substantive requirements. Instead, the plain language of Section 618 states that its normal, two-year limitations period should not commence running until the date on which *liability arises*. *Compare* Section 618 ("An action to enforce liability created under [FCRA] may be brought . . .

within two years of the date on which the liability arises. . . ."), *with* 15 U.S.C. § 1640(e) ("Any action . . . may be brought . . . within one year from the occurrence of the violation.").

The phrase "liability arises" should be interpreted in a straightforward and commonsense manner. *Cf. Hubbard v. United States*, 514 U.S. 695, 699-700 (1995) (preferring sensible statutory interpretation to attenuated construction). Plainly, "liability" — in the context of negligence — cannot exist unless all necessary elements are present: duty, breach, *causation* and *damages*. *See Rotella*, 120 S. Ct. at 1082 n.4 ("cardinal principle that a cause of action does not begin to run until the cause of action is complete"). Thus, "liability" as used in Section 618 requires a complete cause of action.

Similarly instructive is the meaning of the term "arises," which usually indicates the "springing up" or "presentation" of something already in existence. *See, e.g.*, 1 THE OXFORD ENGLISH DICTIONARY 629 (2d ed. 1989) (defining "arise" as "to spring up, . . . present itself"). Thus, the phrase in Section 618, "liability arises," means the presentation, springing up or manifestation of a complete cause of action.

In addition to its normal provision, Section 618 also includes a "misrepresentation exception," which provides:

> where a defendant has materially and willfully misrepresented any information required under [FCRA] to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual . . . , the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

15 U.S.C. § 1681p.

This "misrepresentation exception" is Congress' codification of the judicial concept of equitable estoppel.

It provides that, when a reporting agency materially deceives a consumer concerning the agency's extant liability to that consumer, the consumer has two years following the discovery of the deceit to bring a suit concerning the original liability, rather than two years from the time that the underlying liability arose.[10] Thus, the misrepresentation exception completely restarts the two-year statute of limitations in rare situations.[11]

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[10] By codifying the "misrepresentation exception," Congress mandated application of estoppel where it might otherwise be denied due either to courts reserving their equitable powers or to the "jurisdictional" nature of FCRA's statute of limitations. A "jurisdictional" statute of limitations or repose sets forth both time limits and the jurisdiction of courts. *See Hardin v. City Title & Escrow Co.*, 797 F.2d 1037, 1040-41 (D.C. Cir. 1986) (holding that equitable estoppel cannot apply to a jurisdictional limitations provision); *Cada*, 920 F.2d at 451 ("Neither [equitable tolling nor equitable estoppel] applies to a jurisdictional statute of limitations."). The fact that Section 618 is "jurisdictional" in nature says nothing, however, about whether it should be interpreted as a statute of limitations rather than a statute of repose, because statutes of limitations and repose can be equally "jurisdictional" in nature. For example, the Privacy Act's statute of limitations — 5 U.S.C. § 552a(g)(5) — is a "jurisdictional" statute of limitations, whereby its limitations period commences only when the cause of action arises. *See* Pub. L. No. 93-579, § 2, 88 Stat. 1896 (1974) ("An action to enforce any liability created under this section may be brought in any district court . . . within two years from date on which cause of action arises. . . ."). On the other hand, the Truth in Lending Act contains a "jurisdictional" statute of repose, 15 U.S.C. § 1640(e), whereby its limitations period would run immediately upon the defendant's transgression of any substantive provision. *See* Pub. L. No. 90-321, Title I, § 130(e), 82 Stat. 146, 157 (1968) ("Any action . . . may be brought in any United States district court . . . within one year from the occurrence of the violation.").

[11] Rather than merely providing tolling and revival, Congress provided that the two-year limitations period would start entirely afresh when a consumer discovers that a potential defendant had misrepresented any facts material to the establishment of liability against it. Presumably, in the ordinary case, the defendant's liability would

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Depending upon how much of the normal two-year limitations period is consumed *before* a defendant willfully misrepresents information material to its liability, the application of the misrepresentation exception could provide a plaintiff with almost four years — plus any additional time during which the consumer is deceived by a misrepresentation — between the time at which liability first arises and the time by which the complaint thereon must be filed.[12] This further indicates Congress' recognition of the need to provide consumers sufficient time to investigate and fashion claims about the unreasonableness of defendants' arcane credit reporting procedures.

B. The statutory context of Section 618 further indicates that it is a statute of limitations (not a statute of repose), to which is added the estoppel provision.

By axiom, a court should interpret a statute, if possible, as consonant with related provisions. *See In re Catapult Entertainment, Inc.*, 165 F.3d 747, 751 (9th Cir. 1999) (quoting

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have "arisen" before the reporting agency misrepresented material facts to the consumer who is investigating a potential claim. Thus, by enacting Section 618's misrepresentation exception, Congress provided that a defendant's intervening obfuscation would effectively *extend* the normal limitations period.

[12] If, for example, a reporting agency breaches its FCRA duties on July 1, 2000, and the liability first arises on January 1, 2001, the consumer would normally have until January 1, 2003 to file his action. If, however, during the course of plaintiff's investigation of his FCRA claim, the defendant — on June 1, 2002 — misrepresents information material to its liability, the statute would be tolled at that point. Rather than being revived or re-commenced when the intervening deception is later discovered, the limitations period would instead begin anew at that point, providing two additional years to bring suit. Thus, if one assumes the deception is discovered on January 1, 2007 (ignoring any consideration of gross laches), the consumer would have until January 1, 2009 to file suit concerning the liability that initially arose on January 1, 2001.

2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (5th ed. 1992), "A statute should be construed so that effect is given to all its provisions, . . . and so that one section will not destroy another unless the provision is the result of obvious mistake or error."). The context of Section 618 indicates that it should be interpreted as a statute of limitations, not of repose, coupled with the "misrepresentation exception."

First, explaining when "liability arises," FCRA specifies that damages — and not the mere breach of a statutory duty — constitute the *sine qua non* of FCRA liability. *See* 15 U.S.C. § 1681o ("Any consumer reporting agency . . . which is negligent in failing to comply with any requirement imposed under [FCRA] with respect to any consumer is liable to that consumer in an amount equal to the sum of . . . any *actual damages sustained by the consumer as a result of the failure. . . .*") (emphasis added). In this case, Respondent was never injured by any of TRW's various privacy breaches — indeed, she had neither awareness of nor damage from them — until TRW's transgressions first affected her own commercial dealings, when her creditor reviewed the problematic credit history. *See* Pet., App. at 18a.

Second, 15 U.S.C. § 1681g provides the context and reason for Section 618's "misrepresentation exception." *See* 15 U.S.C. § 1681g. Specifically, since FCRA's enactment in 1970, 15 U.S.C. § 1681g has required credit reporting agencies to confess any wrongdoing to a consumer who requests information that is material to potential liability. *See id.* If one appreciates the fact that Congress intended reporting agencies to effectively "blow the whistle on themselves" through the begrudging disclosure of potentially harmful evidence, then the need for the misrepresentation exception becomes clear: the exception is a necessary complement to 15 U.S.C. § 1681g. It operates only in the rare case where a reporting agency compounds its original, constructive fraud (*e.g.*, a privacy breach) with actual fraud (*i.e.*, deliberate obfuscation through "misrepresentation"). Absent deliberate obfuscation by a potential defendant, the two-year statute of limitation suffices. But where a defendant's actual fraud intervenes, estoppel is imperative.[13]

C. FCRA's legislative history reveals that Congress eschewed both a two-year and a five-year statute of repose in favor of the two-year statute of limitations coupled with the "misrepresentation exception."

TRW argues that FCRA's legislative history suggests that Section 618 should be interpreted as a statute of repose coupled with a misrepresentation exception. Pet. at 12-13. Specifically, TRW points to certain statements made by Congressional conferees about the inclusion of the misrepresentation exception and its effect on the statute. *See id.* at 13. Upon closer consideration, however, FCRA's legislative history undercuts TRW's argument.

FCRA was first introduced in the Senate in January 1969. *See* 115 Cong. Rec. 2415-16 (Jan. 31, 1969). As introduced and throughout its almost two-year development in the Senate, the proposed legislation contained a strict, unambiguous, two-year statute of repose measured from the date of the potential defendant's breach of statutory duties of care. *See id.*, *see also* 116 Cong. Rec. 32641 (Sept. 18, 1970) (providing that "[a]ny action under [FCRA] may be brought . . . *within two years from the date of the occurrence of the violation*") (emphasis added).

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[13] TRW argues that Section 618 cannot accommodate an implicit discovery rule due to the overall nature and structure of FCRA. *See* Pet. at 13. Specifically, TRW asserts that "[b]ecause most of the conduct regulated by the Act involves the conduct of credit reporting agencies and their customers independent of consumers, . . . consumers are not immediately aware of [FCRA] violations. . . ." *Id.* TRW's argument is betrayed by the fact that Congress took pains to require that consumers are promptly informed of the source and nature of any credit report that negatively affects a decision regarding the extension or review of credit. *See* 15 U.S.C. § 1681m.

During 1969 and 1970, the House of Representatives considered alternative bills concerning regulation of the credit reporting industry. *See, e.g.*, 115 Cong. Rec. 33824 (Nov. 12, 1969) (introduction of H.R. 14765). Eventually, the favorite bill in the House became H.R. 16340, which was introduced by Rep. Sullivan on March 5, 1970. *See* 116 Cong. Rec. 6200-01 (Mar. 5, 1970) (introduction); *id.* at 7796 (Mar. 17, 1970) (support for H.R. 16340 from author of earlier, competing bill). H.R. 16340 called for a relatively expansive five-year statute of repose. *See* 116 Cong. Rec. 6200 (Section 27, Jurisdiction of Courts, Limitation of Actions, "Civil actions may be brought . . . within 5 years of the violations."). President Nixon's administration publicly supported the H.R. 16340 — including the five-year statute of repose. *See* 116 Cong. Rec. 36576 (Oct. 18, 1970) (remarks of Rep. Sullivan regarding the Nixon administration's support for H.R. 16340).

After the Senate's bill was attached as an amendment to a non-germane House bill (regarding foreign bank secrecy), Congressional conferees met and redrafted FCRA in its final form. *See* 116 Cong. Rec. 32638 (Sept. 18, 1970) (Senate amendment); *id.* at 34149 (Sept. 29, 1970) (appointment of House conferees, including the author of H.R. 16340); *id.* at 35843 (Oct. 8, 1970) (conference report including final FCRA language). When the final product emerged from conference, it contained neither the two-year statute of repose that the Senate had passed, nor the more expansive five-year statute of repose that the House of Representatives and the Nixon administration had favored. Instead, the final product reflected the extant statute of limitations and the misrepresentation exception: "A 2-year statute of limitations *from the date liability arises* is provided, except that where the defendant has willfully misrepresented information material to the establishment of . . . liability, the statute does not begin to run until discovery of such a misrepresentation." *See* 116 Cong. Rec. 36573 (Oct. 13, 1970) (Rep. Sullivan's explanation of final enactment) (emphasis added).

The only logical explanation for the ultimate statutory language is that Congress intended for the normal provision of Section 618 to be a two-year statute of *limitations*, to which it added the misrepresentation exception. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)).

IV. NOTWITHSTANDING PLAIN ERROR BY THE THIRD, SEVENTH, TENTH AND ELEVENTH CIRCUITS COURTS IN THEIR CONSIDERATION OF SECTION 618, THE JUDICIAL TREND FAVORS INTERPRETATION OF IT AS A STATUTE OF LIMITATIONS, NOT OF REPOSE.

Although TRW hints that the Ninth Circuit's decision below will create intolerable conflict throughout the federal courts, *see* Pet. at 8-11, the case law indicates otherwise. The judicial trend already favors recognition of Section 618 as a statute of limitations, not a statute of repose.

A. The Third, Seventh, Tenth and Eleventh Circuits erroneously concluded that interpreting Section 618's general rule as a statute of limitations is incompatible with the estoppel provision.

The first of the circuit courts to consider Section 618 was the Eleventh Circuit in *Clay v. Equifax, Inc.*, 762 F.2d 952 (11th Cir. 1985). Indicating only that the appellant there had asked alternatively for application of the "discovery rule" to negligent FCRA violations, the court merely announced, "[t]hat we will not do." *Id.* at 961. The court provided no explanation or analysis, except that it found no willful misrepresentation by the reporting agency. *See id.* at 960-61 (discussing inapplicability of misrepresentation exception). To the extent that the Eleventh Circuit meant to suggest that the discovery rule and estoppel are somehow mutually exclusive or redundant concepts, the court erred. *See Cada*, 920 F.2d at 450-512 (distinguishing discovery rule from both equitable tolling and equitable estoppel).

The Third Circuit then addressed Section 618 in *Houghton v. Insurance Crime Prevention Inst.*, 795 F.2d 322 (3d Cir. 1986), wherein the court considered the apparent unfairness of not applying the discovery rule to Section 618, but then concluded that application of the discovery rule would render the misrepresentation exception "superfluous." *Id.* at 324-25. The Third Circuit erred in so ruling. The discovery rule and the misrepresentation exception (*i.e.*, estoppel) are wholly distinct and compatible. *See supra* at 18 n.12. A consumer's discovery of the falsity of the defendant's willful obfuscation could occur months or years after the consumer's initial injury (or the discovery thereof) based upon the agency's wrongdoing. Apparently, the *Houghton* court failed to distinguish a consumer's *original* discovery of his cause of action from his *subsequent* discovery of the falsity of a reporting agency's willful misrepresentation. These two "discovery" events are distinct: one is an initial discovery of a credit reporting problem or injury, and the other is a later discovery of the defendant's intervening, active obfuscation of its extant liability.[14]

In 1989, the Seventh Circuit followed the Third Circuit's erroneous decision *Houghton*. *See Rylewicz v. Beaton Serv., Ltd.*, 888 F.2d at 1181 ("We agree with the Third Circuit that an equitable tolling or discovery exception cannot be read into [FCRA].")*.* But the court in *Rylewicz* did not expressly adopt the *Houghton* court's "superfluity" reasoning. It merely restated the *Houghton* court's conclusion that the "misrepresentation exception" indicated Congress' intention to absolutely negate any inference of the discovery rule. *See id.* (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) for the proposition that courts cannot add to any litany of exceptions provided by Congress).

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[14] This important distinction has been overlooked by courts and commentators. For example, the only published law review article concerning Section 618 erroneously concludes that the "trigger" for application of the discovery rule would necessarily be the exact same "trigger" for application of the willful misrepresentation exception. *See* Martha F. Davis, *Solving Statute of Limitations Problems Under the Fair Credit Reporting Act*, 18 Ind. L. Rev. 507, 511 n.31 (1985). On that faulty basis, the author concludes that the venerable discovery rule could not apply to FCRA. *Id.*

The final circuit court to consider Section 618 prior to the Ninth Circuit below was the Tenth Circuit in *Clark v. State Farm Fire and Casualty Ins. Co.*, 54 F.3d 669 (10th Cir. 1995). In *Clark*, the court relied on *Houghton* and *Rylewicz* in concluding: "[T]he evidence failed to show that the [misrepresentation] exception to the two-year limitations period provided by statute applies to plaintiffs' claim. . . ." *Id.* at 672 (quoting 15 U.S.C. § 1681p). In this manner, the Tenth Circuit followed the Third and Seventh Circuits into the same error. Finding the predicate for the misrepresentation exception lacking, the court failed to consider what should trigger commencement of the *normal* limitations period.

As they relate to FCRA's statute of limitations, *Clay*, *Houghton*, *Rylewicz* and *Clark* are all erroneously reasoned.[15] *See McAnly v. Middleton & Reutlinger, P.S.C.*, 77 F. Supp. 2d 810, 812-14 (W.D. Ky. 1999) (declining to follow *Houghton* and *Rylewicz*). In concluding that Section 618's misrepresentation exception precludes the discovery rule, these learned circuit courts misapprehended the normal rule from which the exception varies. The misrepresentation exception

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[15] TRW informs this Court that the district court below had followed an unpublished 1995 decision of the Ninth Circuit which had uncritically followed the reasoning of the Third Circuit's *Houghton* decision, and thereupon refused to apply the discovery rule to Section 618. *See* Pet. at 7 (citing *Allen v. Equifax Credit Info. Services, Inc.*, 46 F.3d 1138, 1995 WL 21422 (9th Cir. Jan. 11, 1995) (mem. op.)).

(Cont'd)

diverges from the normal rule that the two-year limitations period commences when the *liability arises*. *See supra* at 15-18. Therefore, the misrepresentation exception diverges from a statute of limitations, not of repose. To be sure, any statute of limitations includes the discovery rule unless Congress expresses a contrary intent. *See Rotella*, 120 S. Ct. at 1081 ("Federal courts, to be sure, generally apply a discovery rule when a statute [of limitations] is silent on the issue. . . ."); *Lampf*, 501 U.S. at 363; *Cada*, 920 F.2d at 450.

B. Several circuit courts of appeals have interpreted a statute that is virtually identical to Section 618 as a statute of limitations, coupled with the estoppel exception.

Circuit courts of appeals — including the two circuit courts of appeals that uncritically followed *Houghton* into plain error — have, when interpreting statutory language virtually identical to Section 618, found such language to constitute a statute of limitations, not a statute of repose. For example, in *Tijerina v. Walters*, 821 F.2d 789 (D.C. Cir. 1987), the District of Columbia Circuit Court of Appeals interpreted the Privacy Act's two-year statute of limitations concerning personal privacy breaches by the federal government, 5 U.S.C. § 552a(g)(5). That statute of limitations is virtually identical to Section 618 (which was enacted four years before the Privacy Act). *Compare* Section 618, *with* Pub. L. No. 93-579, § 2, 88 Stat. 1896 (1974) (the Privacy Act's statute of limitations).[16]

(Cont'd)

Allen was an unsuccessful case brought by a *pro se* plaintiff, in which the Ninth Circuit (in an unpublished, per curiam decision) uncritically followed *Houghton* and *Rylewicz*. *Allen* thus has no precedential value, and, respectfully, should be afforded no consideration by this Court.

[16] Even though the Privacy Act's statute of limitations, 5 U.S.C. § 552a(g)(5), is essentially identical to Section 618, the Seventh and Tenth Circuits — which followed *Houghton* in refusing to apply the

(Cont'd)

Recognizing that the Privacy Act accommodated the discovery rule, the District of Columbia Circuit held that its two-year limitations period would not commence running "until the plaintiff knows or should know of the alleged violation." *Tijerina*, 821 F.2d at 797-98. Specifically, the court invoked this Court's opinion in *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 427 (1965) for the proposition that Congressional intent must guide the interpretation of a statute of limitations. *See Tijerina*, 821 F.2d at 797. The District of Columbia Circuit then explained the compatibility of the discovery rule with the misrepresentation exception:

> Contrary to the [defendant's] suggestion, our holding does not read out of existence the . . . [misrepresentation exception]. That clause extends the normal limitations period in order to ensure that the [defendant] cannot escape liability by purposefully misrepresenting information that could establish that it already has violated the Act. In such cases, the Act allows the period to commence upon actual discovery of the misrepresentation, whereas our holding today is that for other actions under the act, the period begins when the plaintiff knew or should have known of the violation. Our holding thus in no way affects the special treatment Congress provided for the particularly egregious cases of [defendant] misconduct singled out in the Act's statute of limitations.

Id. at 798 (citation omitted).

(Cont'd)

discovery rule to Section 618 (in *Rylewicz* and *Clark*, respectively) — have themselves applied the discovery rule to the Privacy Act limitations provision. *See Bowyer v. U.S. Dept. of Air Force*, 875 F.2d 632, 635-36 (7th Cir. 1989); *Bergman v. United States*, 751 F.2d 314, 316 (10th Cir. 1984).

One year later, the Ninth Circuit adopted this reasoning from *Tijerina* in *Englerius v. Veterans Admin.*, 837 F.2d 895, 897-98 (9th Cir. 1988) ("We join the Seventh, Tenth and District of Columbia Circuits in holding that a cause of action under the Privacy Act does not arise and the statute of limitations does not begin to run until the plaintiff knows or has reason to know of the alleged violation."). Importantly, *Englerius* (and thus *Tijerina*) formed the basis of the Ninth Circuit's decision at issue here. *See* Pet., App. at 6a.

C. The Fifth and Ninth Circuits each properly interpreted Section 618 as a statute of limitations, coupled with an estoppel exception.

TRW informs this Court of the fact that the Ninth Circuit Court of Appeals below has split from the Third, Seventh, Tenth and Eleventh Circuits by refusing to interpret Section 618 as a statute of repose. Pet. at 8-11. TRW omits mention, however, of the fact that, long ago, the Fifth Circuit Court of Appeals reached a similarly correct conclusion when it decided *Hyde v. Hyberia Nat'l Bank*, 861 F.2d 446 (1988), *cert. denied sub nom Credit Bureau Services – New Orleans v. Hyde*, 491 U.S. 910 (1989). In rejecting the defendant's argument that the "normal" provision of Section 618 should be interpreted as a statute of repose, the Fifth Circuit Court of Appeals reasoned:

> To commence the [limitations] period with the agency's negligent procedures would start the statute [of limitations] before the consumer can even become aware of the very existence of a cause of action. Such an interpretation would obviously frustrate the purpose of the Act. . . . The statute . . . establishes a cause of action to redress specific injuries sustained by the consumer. . . . *[T]he statute [of limitations] should be triggered when the agency issues an erroneous report to an institution with which the consumer is dealing.* . . . Because the tort

> is inchoate until the victim is injured, the date upon which the erroneous information is transmitted by the credit agency to the potential user [with which the consumer is dealing] corresponds to the date on which the limitations period for the tort begins.

Hyde, 861 F.2d at 449 (emphasis added).

Thus, in 1988, the Fifth Circuit firmly rejected the argument that Section 618 should be interpreted as a statute of repose to which Congress affixed the misrepresentation exception, as TRW argues.

The only practical difference between the Fifth Circuit's opinion in *Hyde* and the Ninth Circuit's opinion below is that the Fifth Circuit would commence the two-year limitations period on the date on which some problematic credit information is transmitted by a defendant to "an institution with which the consumer [*i.e.*, plaintiff] is dealing," *id.*, whereas the Ninth Circuit would commence the limitations period when the consumer discovers her injury. Therefore, the Fifth Circuit's interpretation suggests the "injury occurrence rule," whereas the Ninth Circuit has adopted the "injury discovery rule." In the overwhelming majority of FCRA cases, however, the consumer's knowledge (*i.e.*, discovery) would most likely come within a few hours or days of the transmission of problematic information to an institution with which the consumer is dealing. *See* 15 U.S.C. § 1681m (requiring a potential credit grantor to inform the consumer when a negative credit report affects a credit decision). Thus, as a practical matter, the difference between the Fifth Circuit's and Ninth Circuit's respective interpretations is slight, and the reasoning of either is clearly superior to the demonstrably erroneous ***Houghton*** line of reasoning.[17]

D. Even before the Ninth Circuit ruled as it did below, the judicial trend toward recognition of Section 618 as a statute of limitations was developing as it should.

The most recently published district court opinion, *McAnly v. Middleton & Reutlinger, P.S.C.*, 77 F. Supp. 2d 810 (W.D. Ky. 1999), was decided prior to the Ninth Circuit's decision below by a district court located within the Sixth Circuit (which has yet to publish a decision concerning Section 618). The district court in *McAnly* foreshadowed the Ninth Circuit's later reasoning and expressly rejected the erroneous reasoning set forth in Third Circuit's ***Houghton*** and its progeny. *See McAnly*, 77 F. Supp. 2d at 812-14. Accordingly, if this Court opts to leave the interpretation of Section 618 to the lower courts, it can do so with the knowledge that the *Houghton* line of reasoning is already crumbling under its own infirmity. Denying certiorari here would advance that process.

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[17] In the instant case, Respondent was present when problematic credit reporting information was first transmitted to Home Savings and Loan on May 31, 1995, so the "injury occurrence" and "injury discovery" were concomitant — the two-year limitations period began running that day under either "injury" rule. Pet., App. at 18a. Accordingly, Respondent's ongoing case would not be affected were this Court to choose one way or the other between the two interpretations adopted by the Fifth and Ninth Circuits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT STATUTES

15 U.S.C. § 1681b

§ 1681b. Permissible purposes of reports

A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a federal grand jury.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe —

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;

(B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);

(C) the person has provided at least 10 days' prior notice to the consumer whose report is requested, by certified or registered mail to the last known address of the consumer, that the report will be requested; and

(D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under section 454 of the Social Security Act (42 U.S.C. § 654) for use to set an initial or modified child support award.

15 U.S.C. § 1681e

§ 1681e. Compliance procedures

(a) Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 605 and to limit the furnishing of consumer reports to the purposes listed under section 604. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 604.

(b) Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

15 U.S.C. § 1681g

§ 1681g. Disclosures to consumers

(a) Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:

(1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request.

(2) The sources of the information except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed *Provided*: That in the event an action is brought under this title, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

(3) The recipients of any consumer report on the consumer which it has furnished —

(A) for employment purposes within the two-year period preceding the request, and

(B) for any other purpose within the six-month period preceding the request.

(4) The dates, original payees, and amounts of any checks upon which is based any adverse characterizations of the consumer, included in the file at the time of the disclosure.

(b) The requirements of subsection (a) respecting the disclosure of sources of information and the recipients of consumer reports do not apply to information received or consumer reports furnished prior to the effective date of this title except to the extent that the matter involved is contained in the files of the consumer reporting agency on that date.

15 U.S.C. § 1681m

§ 1681m. Requirements on users of consumer reports

(a) Whenever credit or insurance for personal, family, or household purposes, or employment involving a consumer is denied or the charge for such credit or insurance is increased either wholly or partly because of information contained in a consumer report from a consumer reporting agency, the user of the consumer report shall so advise the consumer against whom such adverse action has been taken and supply the name and address of the consumer reporting agency making the report.

(b) Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

(c) No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of subsections (a) and (b).

15 U.S.C. § 1681n

§ 1681n. Civil liability for willful noncompliance

Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of —

(1) any actual damages sustained by the consumer as a result of the failure;

(2) such amount of punitive damages as the court may allow, and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney fees as determined by the court.

15 U.S.C. § 1681o

§ 1681o. Civil liability for negligent noncompliance

Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of —

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney fees as determined by the court.

Supreme Court, U.S.
FILED
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No. 00-1045

IN THE

Supreme Court of the United States

TRW INC.,

Petitioner,

v.

ADELAIDE ANDREWS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY FOR THE PETITIONER

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TABLE OF AUTHORITIES

CASES

Amy v. City of Watertown, 130 U.S. 320 (1889) 7
Bailey v. Glover, 88 U.S. (21 Wall) 342 (1874) 7
Batchelor v. First Nat'l Bank of Blue Island, No. 92 C 5073, 1993 WL 22859 (N.D. Ill. Jan. 20, 1993) 2
Ben-Hur v. Equifax, Info. Serv., Inc., 976 F. Supp. 795 (E.D. Wis. 1997) 2
Bethley v. Louisiana, 520 U.S. 1259 (1997) 3
Cada v. Baxter Healthcare Corp., 920 F.2d 446 (7th Cir. 1990) 4
Edgar v. Reich, 881 F. Supp. 83 (D. Mass. 1995) 2
Fischl v. General Motors Acceptance Corp., 708 F.2d 143 (5th Cir. 1983) 7
Gill v. Kostroff, No. 98-930-CIV-T-17A, 2000 WL 141258 (M.D. Fla. Feb. 8, 2000) 2
Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231 (1959) 5
Hardin v. City Title & Escrow Co., 797 F.2d 1037 (D.C. Cir. 1986) 6
Hyde v. Hibernia Nat'l Bank, 861 F.2d 446 (5th Cir. 1988) 1
McAnly v. Middleton & Reutlinger, P.S.C., 77 F. Supp. 2d 810 (W.D. Ky. 1999) 1
McNamara vv. Guazzoni, No. 98 CIV 4085 (HB), 1999 WL 322648 (S.D.N.Y. May 20, 1999) 2
United States v. Carver, 260 U.S. 482 (1923) 3
Way v. Barr, No. HAR 94-2519, 1995 WL 307525 (D. Md. May 15, 1995) 2
Willison v. Watkins, 28 U.S. (3 Pet.) 43 (1830) 7
Wilson v. Porter, Wright, Morris & Arthur, 921 F. Supp. 758 (S.D. Fla. 1995) 2

STATUTES

15 U.S.C. § 1681 *et seq.* 1
15 U.S.C. § 1681p 4

MISCELLANEOUS

II Calvin W. Corman, *Limitation of Actions* § 9.1, (1991) 4, 5
II Corman, *Limitations of Actions* § 11.1 .... 6, 7
II Corman, *Limitation on Actions* § 11.2.1 7

REPLY FOR PETITIONER

The petition demonstrated that the Ninth Circuit's decision in this case creates a conflict among the circuits on an important and recurring issue. Since the filing of the petition, the Associated Credit Bureaus and the three nationwide credit reporting agencies have filed a brief *amicus curiae* to stress the importance of the question presented and urge this Court to grant certiorari. Moreover, nothing in the opposition casts doubt upon the appropriateness of granting certiorari in this case. To the contrary, the opposition highlights additional reasons why certiorari should be granted in this case.

1. Respondent does not dispute the petition's demonstration (Pet. at 8-11) that there is a square four-to-one conflict among the courts of appeals over the applicability of the discovery rule to the statute of limitations in Section 618 of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*. To the contrary, respondent contends that there is an even deeper conflict in principle among the lower courts.

According to respondent (Opp. at 27-28), the decision below is supported by a decision from the Fifth Circuit, *Hyde v. Hibernia Nat'l Bank*, 861 F.2d 446 (5th Cir. 1988). That is incorrect. In *Hyde*, the Fifth Circuit simply held that Section 618 does not start running until injury occurrs and liability arises, *see id.* at 449-50, which is perfectly consistent with the refusal in cases such as *Houghton* and *Rylewicz* to incorporate the discovery rule and thereby delay the running of the statute of limitations until injury is, or should be, discovered. However, if there were some conflict in the reasoning, that conflict would support granting, not denying, certiorari because it would show a broader conflict in principle underlying the conflicting holdings discussed in the petition.

Citing a recent district court decision from the Sixth Circuit, *McAnly v. Middleton & Reutlinger, P.S.C.*, 77 F. Supp. 2d 810, 814 (W.D. Ky. 1999), respondent also asserts that the current trend is to imply the discovery rule into FCRA, that the opposing *Houghton* line of cases is "already crumbling," and that "[d]enying certiorari here would advance that process." Opp. at 29. Here again, respondent is incorrect. There is no judicial trend towards adoption of the discovery rule: although two years ago one district court in the Sixth Circuit found that Section 618 implicitly incorporated the discovery rule, three prior district courts in other circuits that have also yet to consider the issue rejected the rule.[1]

More importantly, respondent does not—and cannot—point to any evidence suggesting that the circuits rejecting the discovery rule will reconsider their position. To the contrary, cases cited in the petition show that the decisions of those circuits are being implemented.[2] As a consequence, to the extent that *McAnly* shows anything, it is that the conflict among the circuits is likely to deepen, not disappear, absent this Court's intervention.

Finally, there is no basis for respondent's claim that *denying* certiorari will help to resolve this conflict. Certainly, there is no reason to think that the courts of appeals will be prompted by a denial of certiorari in this case to reconsider their positions. As this Court has observed, "[i]t is well-settled that our decision to deny a petition for writ of certiorari does not in

any sense constitute a ruling on the merits of the case in which the writ is sought." *Bethley v. Louisiana*, 520 U.S. 1259 (1997); *see generally United States v. Carver*, 260 U.S. 482, 490 (1923). Thus, respondent's suggestion that the conflict among the circuits will go away without this Court's intervention is nothing more than wishful thinking.

2. Respondent does not—and cannot—seriously dispute that this case presents an important and recurring question worthy of this Court's review. The petition demonstrated (Pet. at 15-17) that credit reporting agencies maintain millions of records in unified national files and that the decision below will force them to expand their record retention policies, thereby imposing an enormous administrative burden upon the industry. Although respondent claims in a footnote that "record evidence" shows that credit reporting agencies could retain data "for many years at minimal costs," Opp. at 2 n.2, she does not cite to any such evidence. Nor does she otherwise contest the petition's demonstration of the importance of the question presented, which, as mentioned above, has been reinforced by the brief of *amicus curiae* the Associated Credit Bureaus, Inc. and the three nationwide credit bureaus. In short, the importance of the question presented is essentially unchallenged.

3. Respondent's primary argument in opposition to certiorari is that the misrepresentation exception in Section 618 is not a specialized discovery rule, but rather a codification of the principle of equitable estoppel. Opp. at 15-22. To the extent that there is any merit in this theory—which admittedly has been "overlooked by courts and commentators" (*id.* at 23 n.14) and appears to have been advanced for the first time anywhere in the opposition—it is a reason for granting, not denying, certiorari. If, as respondent asserts, a majority of courts of appeals to consider the question presented have not only erred, but also overlooked important distinctions between

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[1] *See McNamara vv. Guazzoni*, No. 98 CIV 4085 (HB), 1999 WL 322648, at *4 (S.D.N.Y. May 20, 1999); *Way v. Barr*, No. HAR 94-2519, 1995 WL 307525, at *2 (D. Md. May 15, 1995); *Edgar v. Reich*, 881 F. Supp. 83, 84-87 (D. Mass. 1995).

[2] *See Gill v. Kostroff*, No. 98-930-CIV-T-17A, 2000 WL 141258, at *3-*6 (M.D. Fla. Feb. 8, 2000); *Ben-Hur v. Equifax, Info. Serv., Inc.*, 976 F. Supp. 795, 801-02 (E.D. Wis. 1997); *Wilson v. Porter, Wright, Morris & Arthur*, 921 F. Supp. 758, 759-61 (S.D. Fla. 1995); *Batchelor v. First Nat'l Bank of Blue Island*, No. 92 C 5073, 1993 WL 22859, at *3 (N.D. Ill. Jan. 20, 1993).

tolling and accrual doctrines in doing so, the lower courts are plainly in need of guidance in this area.

In any event, respondent's novel interpretation of the misrepresentation exception in Section 618 is unpersuasive. *First*, this interpretation conflicts with the text of the statute. As respondent recognizes, equitable estoppel is a tolling doctrine which suspends the running of the limitations period. Opp. at 9-10; *see generally Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990). The misrepresentation exception in Section 618 does not, however, stop the running of the statute of limitations: it starts a new two-year limitations period running. *See* 15 U.S.C. § 1681p (providing that, where there is a covered misrepresentation, "the action may be brought at any time within two years after discovery by the individual of the misrepresentation"). As accrual rules govern when statutes of limitations begin to run, *see, e.g.*, *Cada*, 920 F.2d at 450, the misrepresentation exception is clearly an accrual rule, not the codification of a tolling doctrine.

Even more fundamentally, the misrepresentation exception does not codify the equitable estoppel doctrine. In the statute of limitations context, equitable estoppel has four elements:

> (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth;
>
> (2) inability of the party asserting estoppel to know or discover the truth;
>
> (3) the false representation or concealment made with the intent that it be relied upon; and
>
> (4) the person to whom the representation or concealment was made thus suffering prejudice by his or her reliance.

II Calvin W. Corman, *Limitation of Actions* § 9.1, at 28-29 (1991). The misrepresentation exception does not, however, contain anything even remotely resembling the third element's scienter requirement or the final element's requirement of reliance. Thus, the misrepresentation exception does not codify the equitable estoppel doctrine either in substance or in effect.

Second, plaintiffs' interpretation makes little sense. By the time that FCRA was enacted in 1970, it was already well-settled that the equitable estoppel doctrine presumptively applies to express statutes of limitation such as Section 618. *See, e.g.*, *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 234 (1959); *see generally* II Corman, *Limitation of Actions* § 9.1, at 31. Consequently, Congress had no need to codify the equitable estoppel doctrine in order to ensure its application.

Recognizing this problem, respondent suggests that Congress codified the equitable estoppel doctrine because Section 618 is jurisdictional in nature and therefore precludes the application of any tolling doctrines. Opp. at 17 n.10. Respondent fails, however, to offer any reason why Congress would have made Section 618 jurisdictional. FCRA is a consumer protection statute, not a statute authorizing suit against the federal government, and it is therefore unlikely that Congress wanted to make the statute of limitations barring consumer claims jurisdictional in nature and thereby prevent defendants from waiving the limitations period. Thus, while creative, respondent's claim that Section 618 is jurisdictional, like its broader theory that the statute codifies the equitable estoppel doctrine, is unpersuasive.

Third, respondent's equitable estoppel theory does not prove that Section 618 implicitly incorporates the discovery rule. The petition demonstrated that, when Congress carves out an express exception to a statute, additional, unenumerated exceptions cannot be implied absent clear evidence of Congress' intent to do so. Pet. at 12. It also demonstrated that this principle applies with special force here because implying a general discovery exception into the statute of limitations would render the misrepresentation exception superfluous. *Id.* Plaintiffs' theory answers this second point by giving the misrepresentation exception (some) meaning independent of the discovery rule. The theory does not, however, in any way undermine petitioner's first argument that Congress would have explicitly referred to the discovery rule had it intended to incorporate the rule into Section 618.

To the contrary, respondent's theory reinforces this argument. As respondent's own authority acknowledges, if Section 618 really is jurisdictional, it "must be strictly construed." *Hardin v. City Title & Escrow Co.*, 797 F.2d 1037, 1040 (D.C. Cir. 1986). Consequently, if respondent's theory is correct and Section 618 is jurisdictional, the misrepresentation exception must be interpreted to preclude implicit accrual rules and tolling doctrines. After all, if Congress were concerned enough with the running of the statute of limitations to provide a special rule for the admittedly rare situations in which (i) a reporting agency willfully misrepresents information concerning its liability to a consumer who (ii) already has discovered that liability and (iii) the consumer refrains from bringing suit in reliance upon that misrepresentation, it surely would have thought to provide for a discovery rule that would apply in many, if not most, situations. As a consequence, here again, respondent's argument undermines her position.

4. Respondent asserts that petitioner and the authority on which it relied has improperly interpreted Section 618 to be a statute of repose rather than a statute of limitation. Opp. at 20, 22-25. This is a strawman. Neither the petition nor any of the court of appeals cases rejecting the discovery rule refer to statutes of repose. Moreover, contrary to plaintiffs' intimation, a statute of limitations does not by definition incorporate the discovery rule. As one of respondent's own authorities recognizes, "[g]enerally, . . . the statute of limitation begins to run[] at the time of the occurrence of a judicially recognizable injury or event constituting a breach of duty . . . even though the plaintiff is unaware of the accrual of his or her cause of action." II Corman, *Limitations of Actions* § 11.1, at 134.

Respondent also errs in asserting that the discovery rule has been consistently implied into federal statutes of limitations for at least 170 years. Opp. at 10-15. In fact, the general discovery rule did not begin to develop until the 1950s. *See* II Corman, *Limitation on Actions* § 11.2.1, at 136-39. The decisions cited by respondent deal instead with the specialized rule for the accrual of fraud claims. *See Amy v. City of Watertown*, 130 U.S. 320, 324 (1889); *Bailey v. Glover*, 88 U.S. (21 Wall) 342, 349-50 (1874); *Willison v. Watkins*, 28 U.S. (3 Pet.) 43 (1830). Those cases are, however, clearly inapposite because there was no fraud, whether actual or constructive, here. Respondent's claim is that petitioner improperly disclosed information to a third party, not that petitioner made misrepresentations or even omitted to make any required representations to her.

5. Although respondent does not directly dispute the petition's demonstration (Pet. at 17) that this case is a good vehicle for addressing the broader issue of the applicability of the discovery rule to federal statutes of limitations, she does repeatedly assert that her claims did not accrue until she suffered financial injury as a result of the improper disclosure of her credit reports. Opp. at 4, 9 n.5, 15, 19. Respondent did not, however, advance this factual argument below -- and with good reason. It is well-settled that a cause of action may be based upon an invasion of privacy, damages to reputation, or other injury even in the absence of any financial loss. *See, e.g., Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 151 (5th Cir. 1983) ("Even where no pecuniary or out-of pocket loss has been shown, the FCRA permits recovery for humiliation and mental distress, as well as for injury to one's reputation and creditworthiness.") (citations omitted). Thus, the timing of respondent's financial injury does not in any way undermine the petition's demonstration that this case is a good

vehicle for resolving the important and recurring question presented by this case or the broader questions implicated by respondent's arguments.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

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No. 00-1045

IN THE

Supreme Court of the United States

TRW INC.,

Petitioner,

v.

ADELAIDE ANDREWS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE ASSOCIATED CREDIT BUREAUS, INC., TRANS UNION LLC, EQUIFAX CREDIT INFORMATION SERVICES, INC., AND EXPERIAN INFORMATION SOLUTIONS, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY 3

REASONS FOR GRANTING THE WRIT 3

- I. The Fair Credit Reporting Act Creates Substantial Record-Keeping Requirements for Credit Reporting Agencies 3
  - A. The FCRA Imposes Significant Consumer Disclosure, Investigation and Notice Obligations 3
  - B. Compliance With the FCRA Consumer Relations Requirements Creates Large Amounts of Computerized and Paper Files . 7
- II. The Decision Below Will Impose Significant Additional Burdens on Credit Reporting Agencies . 9
  - A. The Ninth Circuit Ruling Will Impose Additional Document Retention Burdens on Consumer Reporting Agencies 9
  - B. The Ninth Circuit Ruling Will Encourage The Filing Of Otherwise Time-Barred Cases, And Create Uncertainty As To What Actions Are Barred 10

III. The Decision Below Was Wrongly Decided 11

CONCLUSION 12

TABLE OF AUTHORITIES

CASES	**Page**
Dunn v. Commodity Futures Trading Com'n, 519 U.S. 465 (1997)	11
United States v. Brockamp, 519 U.S. 347 (1997)	10

STATUTES

15 U.S.C. § 1681	2
15 U.S.C. § 1681(a)(1)	1
15 U.S.C. § 1681(a)(3)	1
15 U.S.C. § 1681a(f)	3
15 U.S.C. § 1681b(a)	4
15 U.S.C. § 1681e(b)	4
15 U.S.C. § 1681g(a)	4
15 U.S.C. § 1681g(a)(3)(A)	9
15 U.S.C. § 1681g(c)	4
15 U.S.C. § 1681h	4
15 U.S.C. § 1681i(a)(1)(A)	5

15 U.S.C. § 1681i(a)(2) 5

15 U.S.C. § 1681i(a)(3)(B) 6

15 U.S.C. § 1681i(a)(5)(B) 6

15 U.S.C. § 1681i(a)(5)(D) 6

15 U.S.C. § 1681i(a)(6) 6

15 U.S.C. § 1681i(a)(6)(B)(iv) 6

15 U.S.C. § 1681i(d) 6

15 U.S.C. § 1681j(b) 5

15 U.S.C. § 1681j(c) 5

15 U.S.C. § 1681m(a) 5

15 U.S.C. § 1681n 6

15 U.S.C. § 1681n(a)(3) 10

15 U.S.C. § 1681o 6

15 U.S.C. § 1681o(a)(2) 10

15 U.S.C. § 1681p 11

15 U.S.C. § 1681s-2(b)(1) 5

15 U.S.C. § 1681s-2(b)(1)(D) 5

28 U.S.C. § 1331 10

MISCELLANEOUS

116 Cong. Rec. 35940 (Oct. 9, 1970) (statement of Sen. Proxmire) 11

Federal Trade Commission Fair Credit Reporting Act Staff Opinion Letter to Stephen Kilgo, July 28, 1998, at 1 *available at* http:// www.ftc.gov/os/statute/fcra/kilgo.htm (visited January 19, 2001) 8

H.R. Conf. Rep. 91-1587, *reprinted in* 1970 U.S.C.C.A.N. 4411, 4416 11

S. 823, 91st Cong. § 618 (1969) 11

STATEMENT OF INTEREST

The consumer credit reporting industry plays a vital role in the national economy by facilitating the granting of credit, insurance, and employment to consumers.[1] As Congress expressly stated over thirty years ago, the American banking system is "dependent upon fair and accurate credit reporting," and consumer credit reporting agencies "have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. § 1681(a)(1), (3).

Associated Credit Bureaus, Inc. ("ACB"), is a non-profit trade association which represents the interests of the consumer credit reporting industry. ACB's members include almost 400 national, regional, and local credit bureaus located throughout the United States and Puerto Rico. ACB's members collect and maintain information on the credit histories of more than 190 million Americans. From this information, ACB's members compile roughly 900 million consumer credit reports annually, which are used by their customers for purposes that include determining consumers' eligibility for consumer credit, insurance, and other permissible purposes.

Trans Union LLC ("Trans Union"), Equifax Credit Information Services, Inc. ("Equifax"), and Experian Information Solutions, Inc. ("Experian"), which are members of ACB, are the largest consumer credit reporting agencies in the United States. The three major nationwide credit bureaus each maintain computerized databases containing credit information relating to over 180 million American consumers. These databases are continually updated with information obtained from more than 85,000 sources, including banks, mortgage companies, utilities, and public records. Credit reports include identifying information, detailed payment history and other account information, bankruptcy filings, tax liens and other public record information, and the identity of entities receiving the consumer's credit report.

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[1] Counsel for Petitioner, Daniel H. Bromberg, Esq., of Jones, Day, Reavis & Pogue, and counsel for Respondent, Andrew Henderson, Esq., of Hall & Henderson, LLP, have given their consent to *Amici* to file this brief. Letters documenting this consent are filed concurrently with this brief. Counsel for the *Amici* were the sole authors of this brief. No person or entity other than *Amici* made a financial contribution to this brief.

The three *Amici* consumer reporting agencies maintain files on residents of all fifty States, and employ procedures which apply across their national operations. Even those consumer reporting agencies which do not maintain nationwide files operate on a national level. Unlike the national economy of only thirty years ago, consumers today obtain credit from not only local merchants, but credit card companies, retailers and other credit grantors across the nation. For example, a local consumer reporting agency maintaining files only on residents of Georgia nonetheless may disclose consumer credit information to customers throughout the United States who receive credit applications from Georgia residents.

Amici jointly submit this brief in support of the Petition for Writ of Certiorari because of the importance of the case to the credit reporting industry, and because an understanding of the credit reporting industry is helpful to understanding the significance of the case. *Amici* have a strong interest in the question raised in this case regarding the statute of limitations period governing claims brought under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq*. The consumer credit reporting activities of ACB members, including Trans Union, Experian, and Equifax, are extensively regulated by the FCRA. In addition, Trans Union was a defendant in the proceedings while the action was pending before the district court, and Experian is the successor to the consumer credit reporting operations of Petitioner TRW Inc. Further, in reliance upon the two-year limitations period under the FCRA, *Amici* have established retention policies for computerized data and documents created in connection with fulfilling their consumer disclosure and dispute investigation duties of the FCRA.

SUMMARY

Amici urge the Court to grant the TRW Inc. Petition for Writ of Certiorari. The case is of great significance to the credit reporting industry because the decision below imposes additional document retention burdens on the credit reporting industry that were not intended by the FCRA, and because it will needlessly encourage the filing of FCRA claims that are barred by the statute of limitations.

REASONS FOR GRANTING THE WRIT

I. The Fair Credit Reporting Act Creates Substantial Record-Keeping Requirements for Credit Reporting Agencies.

A. The FCRA Imposes Significant Consumer Disclosure, Investigation and Notice Obligations.

1. The FCRA extensively regulates the maintenance and disclosure of information by credit reporting agencies, described as "consumer reporting agencies" under the statute. 15 U.S.C. § 1681a(f). Section 607(b) of the Act mandates that, in compiling a credit report, or "consumer report," consumer

reporting agencies must follow "reasonable procedures" to assure "maximum possible accuracy" of the information contained in the report. 15 U.S.C. § 1681e(b). In turn, consumer reports created by consumer reporting agencies may be distributed only to those with a statutorily-defined "permissible purpose" to receive the report, *e.g*, to determine a consumer's eligibility for credit, insurance, or employment. 15 U.S.C. § 1681b(a).

2. The FCRA imposes on consumer reporting agencies the obligation to disclose to consumers information that is maintained regarding them, to investigate consumer disputes regarding such information, and to promptly notify consumers of the results of such investigation.

Section 609(a) of the FCRA requires consumer reporting agencies, at the request of a consumer, to disclose: "[a]ll information in the consumer's file at the time of the request"; all sources of that information; and the identity (name, address and phone number) of each person that procured a consumer report regarding the consumer in the prior year (or prior two years, for reports obtained for employment purposes). 15 U.S.C. § 1681g(a). Such disclosures must include written notice of all rights provided to consumers under the FCRA and, "in the case of a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis,"a toll-free telephone number at which consumers may contact agency personnel. 15 U.S.C. § 1681g(c). The conditions and form of disclosures to consumers are further prescribed by Section 610 of the FCRA, 15 U.S.C. § 1681h.

Consumers can obtain a copy of their consumer report free of charge if the consumer is unemployed or a recipient of public welfare assistance, or if the consumer has reason to believe that

the information maintained is inaccurate due to fraud (*e.g.*, identity theft). 15 U.S.C. § 1681j(c). A consumer who has been denied credit, or is the subject of any other similar adverse action based in part on information contained in consumer reports, may also obtain a consumer report free of charge. 15 U.S.C. § 1681j(b). In addition, any credit grantor or other person who takes any adverse action must provide the consumer with the name, address, and toll-free telephone number of the consumer reporting agency which prepared the report, and must also notify the consumer of her right to a free consumer report and to dispute any information maintained by the agency. 15 U.S.C. § 1681m(a).

The FCRA also requires consumer reporting agencies to process and timely investigate consumer disputes regarding the information they maintain. If a consumer disputes the "completeness or accuracy of any item of information contained in a consumer's file," the consumer reporting agency must reinvestigate free of charge and record the current status of the information or delete it from the file within thirty days of receiving the dispute. 15 U.S.C. § 1681i(a)(1)(A). Within five days of receiving a consumer dispute, the consumer reporting agency must provide the furnisher of the disputed information with "all relevant information regarding the dispute." 15 U.S.C. § 1681i(a)(2). Data furnishers receiving such disputes from consumer reporting agencies must conduct an investigation and report the results to the consumer reporting agency. 15 U.S.C. § 1681s-2(b)(1). If the disputed information is incomplete or inaccurate the data furnisher must also notify all national consumer reporting agencies. 15 U.S.C. § 1681s-2(b)(1)(D).[2]

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[2] Consumer reporting agencies operating on a national basis must implement "an automated system" to facilitate the investigation procedures (continued...)

Consumer reporting agencies must provide written notice to consumers if the dispute is determined irrelevant. 15 U.S.C. § 1681i(a)(3)(B). The agencies must also notify the consumer of the results of the investigation within five (5) days of completing the investigation. 15 U.S.C. § 1681i(a)(6). Consumer reporting agencies must provide consumers with notice of their right to add a statement to the consumer's file disputing its accuracy or completeness. 15 U.S.C. § 1681i(a)(6)(B)(iv). At the request of the consumer, a consumer reporting agency must also notify those receiving the consumer's credit report in the last six to twenty-four months of the consumer's dispute statement, or that inaccurate information was deleted. 15 U.S.C. § 1681i(d). If information which was once disputed and deleted is later reinserted into a consumer's file, the consumer reporting agency must so notify the consumer. 15 U.S.C. § 1681i(a)(5)(B).

3. The FCRA also provides consumers with a cause of action against consumer reporting agencies which negligently or willfully violate any provision of the FCRA. 15 U.S.C. §§ 1681n, 1681o. Section 616 provides consumers with the right to compensatory or statutory damages and punitive damages if a consumer reporting agency willfully violates the Act. 15 U.S.C. § 1681n. Section 617 provides for the recovery of actual damages by consumers who have been harmed by a negligent failure to comply with the FCRA. 15 U.S.C. § 1681o.

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[2] (...continued)
of consumer reporting agencies and data furnishers. 15 U.S.C. § 1681i(a)(5)(D). *Amicus* ACB operates the required automated system for the three *Amici* nationwide consumer reporting agencies.

B. Compliance With the FCRA Consumer Relations Requirements Creates Large Amounts of Computerized and Paper Files.

Compliance by consumer reporting agencies with the disclosure, investigation and notice obligations of the FCRA creates large amounts of computerized and paper files. The three *Amici* consumer reporting agencies, for example, currently maintain tens of thousands of cubic feet of historical paper files and thousands of computerized cartridges containing archived data.

The *Amici* consumer reporting agencies each separately maintain computerized systems to process consumer disputes and requests for file disclosures, and to create a record of the disclosure and internal investigation procedures in individual instances. Communications between consumers and the agency, either by phone or in writing, corrections or other maintenance in connection with the consumers' disputes, and contacts with data furnishers regarding the disputes are maintained on the systems. Separately, the consumer reporting agencies receive and create a variety of paper documents in connection with consumer requests and disputes, and the responses to such inquiries.

The types and quantity of information maintained by consumer reporting agencies is illustrated by the files of Trans Union reflecting the dispute filed by Respondent Adelaide Andrews.[3] Respondent sued Trans Union in the proceedings below, but later settled with Trans Union. Trans Union's files produced in the district court proceedings included:

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[3] Trans Union possessed the historical paper and computer files because they were created less than two years before Respondent filed her action.

- computerized and written records of Respondent's multiple phone conversations with Trans Union employees;
- correspondence (and lengthy attachments) between Trans Union and Respondent regarding her requests;
- various forms completed by Trans Union and/or Respondent in processing the consumer's requests;
- copies of Trans Union file disclosures provided to Respondent; and
- correspondence between Trans Union and the data furnisher whose information was the subject of Respondent's dispute.

These documents were relevant to Respondent's FCRA claims that Trans Union failed to use reasonable procedures to assure maximum possible accuracy of information regarding Respondent, and that Trans Union failed reasonably to investigate her dispute. *See* App. 11a, 18a-19a.

The *Amici* consumer reporting agencies have established document retention policies with respect to consumer relations activities which are keyed to the two-year limitations period established by the FCRA, 15 U.S.C. § 1681p. These retention policies, like those of many other consumer reporting agencies, are consistent with the informal guidelines of the Federal Trade Commission, the federal agency with enforcement authority under the FCRA. *See, e.g.*, Federal Trade Commission Fair Credit Reporting Act Staff Opinion Letter to Stephen Kilgo, July 28, 1998, at 1 *available at* http://

www.ftc.gov/os/statute/fcra/kilgo.htm (visited January 19, 2001) (recommending that documents concerning compliance with the Act be retained for at least the two-year limitations).[4]

II. The Decision Below Will Impose Significant Additional Burdens on Credit Reporting Agencies.

A. The Ninth Circuit Ruling Will Impose Additional Document Retention Burdens on Consumer Reporting Agencies.

Prior to the recent ruling by the Ninth Circuit, each of the four federal appellate courts which considered the issue have interpreted the FCRA consistent with legislative intent and rejected incorporating an implied discovery rule into Section 618. As explained by the Petition (Pet. 8-11), however, the Ninth Circuit has issued a contrary ruling, thereby creating a four-to-one split among the federal courts of appeals regarding application of the general discovery rule to the FCRA statute of limitations. As a result, the two-year limitations period for FCRA claims, which governs consumer reporting agencies' document retention policies, is no longer certain.

If the circuit split is not resolved by the Court, the Ninth Circuit decision will have a serious impact on the document retention policies of consumer reporting agencies relating to their consumer relations operations. Consumer reporting agencies receive millions of consumer requests for file disclosures and investigate millions of consumer disputes each year. These consumer relations activities create large amounts of computerized data and documents which may be necessary to defend against actions brought under the FCRA. The Court has previously noted the "serious administrative problems" associated with implying equitable tolling exceptions into federal statutes which govern large operations impacting millions of individuals. *See United States v. Brockamp*, 519 U.S. 347, 352-53 (1997)(refusing to read equitable tolling exception into federal statute governing IRS processing of 200 million tax returns and 90 million refunds each year, noting the attendant "serious administrative problems" of forcing the IRS to litigate stale claims).

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[4] The *Amici's* document retention policies are also consistent with the plain language of the FCRA. The statute requires consumer reporting agencies to disclose to consumers the identity of those persons receiving their credit reports within the prior one to two years. 15 U.S.C. § 1681g(a)(3)(A). Therefore, consumer reporting agencies have no obligation to maintain such information for more than the two-year limitations period.

B. The Ninth Circuit Ruling Will Encourage The Filing Of Otherwise Time-Barred Cases, And Create Uncertainty As To What Actions Are Barred.

Consumer claims against consumer reporting agencies brought under the FCRA are federal questions, permitting such suits to be brought in the federal courts, regardless of the amount in controversy. *See* 28 U.S.C. § 1331. Such lawsuits often involve relatively small monetary awards. However, the FCRA provides for an award of attorneys fees to claimants prevailing on willful and even negligent violations of the FCRA, 15 U.S.C. § 1681n(a)(3), § 1681o(a)(2), thereby eliminating any disincentive for such small claims. Due in part to the public's increasing awareness and concern regarding privacy issues, the number of FCRA suits filed in the federal courts is increasing. *See* Pet. 15 n.4. The decision of the Ninth Circuit will likely encourage the filing of lawsuits which would otherwise be clearly barred by the FCRA statute of limitations, as interpreted by the Third, Seventh, Tenth, and Eleventh Circuits. As noted by the Petition (Pet. 15 n.5), questions concerning whether the discovery rule will permit suits based upon conduct outside of the FCRA's two-year limitations period are frequently raised. The four-to-one split among the federal courts of appeal creates uncertainty as to the law to be applied by district courts in determining whether an FCRA suit is time-barred, thereby increasing the litigation of the issue.

III. The Decision Below Was Wrongly Decided.

Congress expressly provided for a two-year statute of limitations period under the FCRA, except "where a defendant has materially and wilfully misrepresented any information required under [the FCRA] to be disclosed to an individual." 15 U.S.C. § 1681p. This sole exception was not part of the original version of the FCRA passed by the Senate, which was later amended to include the fraud exception. *See* S. 823, 91st Cong. § 618 (1969); 116 Cong. Rec. 35940 (Oct. 9, 1970) (statement of Sen. Proxmire); H.R. Conf. Rep. 91-1587, *reprinted in* 1970 U.S.C.C.A.N. 4411, 4416. The Ninth Circuit's interpretation of the statute renders the exception language of Section 1681p "mere surplusage." *See Dunn v. Commodity Futures Trading Com'n*, 519 U.S. 465, 472 (1997). If Congress intended, in enacting the FCRA, to incorporate the implied general discovery rule into the FCRA statute of limitations, there would be no need to create the narrow fraud exception. For example, if a defendant "materially and wilfully misrepresented any information" to a plaintiff, the plaintiff clearly did not know or should not have known of her claim. Therefore, the only proper interpretation of the FCRA statute of limitations and the legislative intent behind it is that the discovery rule does not apply.

CONCLUSION

For the foregoing reasons, *Amici* Associated Credit Bureaus, Inc., Trans Union LLC, Equifax Credit Information Services, Inc., and Experian Information Solutions, Inc. respectfully request that this Court grant the petition for a writ of certiorari.

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Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

JOINT APPENDIX

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TABLE OF CONTENTS

Page

Relevant Docket Entries 1

United States District Court for the Central District of California 1

United States Court of Appeals For the Ninth Circuit .. 6

Complaint (October 21, 1996) 8

Answer of Defendant TRW Inc. (March 13, 1997) 21

Excerpts from the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 - 1681u 32

RELEVANT DOCKET ENTRIES

I. THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, CV 96-7369

1. 10/21/96 Summons and Complaint
2. 3/13/97 Answer by TRW Inc.
3. 3/21/97 Answer by Trans Union Corp.
4. 5/19/97 Order re Pretrial Conference
5. 7/31/97 Stipulation and Order for Protective Order
6. 8/28/97 Notice of Motion and Motion by Defendant Trans Union Corp. for Leave to File Third-Party Complaint Impleading Third-Party Defendant
7. 8/28/97 Lodging of Proposed Third Party Complaint For: (1) Complete Equitable Indemnity; (2) Comparative Contribution and Indemnity; and (3) Declaratory Relief
8. 10/6/97 Plaintiff's Opposition to Trans Union's Motion For Leave to File Third-Party Complaint Impleading Third-Party Defendant
9. 10/20/97 Order Denying Leave to File Third-Party Complaint Impleading Third-Party Defendant
10. 2/23/98 Notice of Motion and Motion of Defendant TRW Inc. for Partial Summary Judgment
11. 2/23/98 Memorandum in Support of Motion by Defendant TRW Inc. for Partial Summary Judgment

12.	2/23/98	Declaration of David Goldston in Support of Motion by Defendant TRW Inc. for Partial Summary Judgment
13.	2/23/98	Declaration of Dennis Rice in Support of Motion by Defendant TRW Inc. for Partial Summary Judgement
14.	2/23/98	Notice of Motion and Motion for Summary Judgment by Defendant Trans Union Corp. (filed under seal)
15.	2/23/98	Memorandum of Points and Authorities by Defendant Trans Union Corp. in Support of Motion for Summary Judgment (filed under seal)
16.	2/23/98	Declaration of Michael O'Neil for Defendant Trans Union Corp. (filed under seal)
17.	2/23/98	Declaration of David Browne in Support of Motion by Defendant TRW Inc. for Partial Summary Judgment (filed under seal)
18.	2/23/98	Declaration of Kevin Lussier for Defendant TRW Inc. (filed under seal)
19.	3/2/98	Opposition by Plaintiff to TRW's Motion for Partial Summary Judgment (filed under seal)
20.	3/2/98	Opposition by Plaintiff to Trans Union's Motion for Summary Judgment (filed under seal)
21.	3/2/98	Statement of Genuine Issues in Opposition to TRW's Motion for Summary Judgment (filed under seal)
22.	3/2/98	Declaration of Douglas Stott Parker, Jr., in Opposition to TRW's Motion for Partial Summary Judgment (filed under seal)

23.	3/2/98	Declaration of Gus T. May in Opposition to TRW's Motion for Partial Summary Judgment (filed under seal)
24.	3/2/98	Declaration of Evan Hendricks in Opposition to Trans Union's Motion for Summary Judgment (filed under seal)
25.	3/9/98	Reply by Defendant Trans Union Corp. to Response to Motion for Summary Judgment
26.	3/9/98	Declaration of Michael O'Neil for Defendant Trans Union Corp. re Motion for Summary Judgment
27.	3/9/98	Reply by Defendant TRW Inc. to Plaintiff's Genuine Issues in Opposition to Motion for Partial Summary Judgment
28.	3/9/98	Objection by Defendant TRW Inc. to Declaration of Evan Hendricks in Opposition to Motion for Partial Summary Judgment
29.	3/9/98	Objection by Defendant TRW Inc. to Declaration of Douglas Stott Parker, Jr., PhD in Opposition to Motion for Partial Summary Judgment
30.	3/9/98	Declaration of Daniel J. McLoon in Support of Motion by Defendant TRW Inc. for Partial Summary Judgment
31.	3/9/98	Reply Memorandum of Points and Authorities in Support of Motion by Defendant TRW Inc. for Partial Summary Judgment
32.	3/9/98	Supplemental Declaration of Kevin R. Lussier in Support of Motion by Defendant TRW Inc. for Partial Summary Judgment

33.	3/16/98	Declaration of Andrew R. Henderson in Opposition to TRW's Objection to the Testimony of Plaintiff's Expert Douglass Stott Parker, Jr., re Motion to Compel Drafts to Produce Requested
34.	3/16/98	Response by Plaintiff to TRW Inc.'s Objection to Declaration of Evan Hendricks re Motion for Partial Summary Judgment
35.	3/16/98	Response by Plaintiff to TRW Inc.'s Objection to Declaration of Douglass Stott Parker, Jr., Ph.D, re Motion for Partial Summary Judgment
36.	4/27/98	Amended Answer of Defendant Trans Union Corp.
37.	5/27/98	Order Granting in Part and Denying in Part Trans Union's Motion for Summary Judgment and Granting TRW's Motion for Partial Summary Judgment
38.	6/8/98	Memorandum of Contentions of Fact and Law by Defendant TRW Inc.
39.	6/8/98	Memorandum of Contentions of Fact and Law by Defendant Trans Union Corp.
40.	6/8/98	Memorandum of Contentions of Facts and Law by Plaintiff (filed under seal)
41.	6/9/98	Amended Memorandum of Contentions of Facts and Law by Plaintiff (filed under seal)
42.	6/18/98	Notice by Defendant TRW of Lodging Deposition Transcripts
43.	6/29/98	Defendant Trans Union Corp.'s Statement of Claims and Defenses

44.	7/16/98	Notice of Settlement Between Plaintiff and Defendant Trans Union Corp.
45.	7/23/98	Notice of Dismissal as to Defendant Trans Union Corp.
46.	7/24/98	Stipulation and Order re Dismissal of Trans Union Corp.
47.	7/31/98	Joint Statement-of the Case
48.	8/3/98	Transcript Filed for Proceedings Held on 7/9/98
49.	8/3/98	Transcript Filed for Proceedings Held on 7/22/98
50.	8/3/98	Transcript Filed for Proceedings Held on 7/17/98
51.	8/4/98	Notice by Plaintiff of Lodging Deposition Transcripts for Trial
52.	8/6/98	Notice by Defendant TRW of Lodging Original Deposition Transcripts
53.	8/14/98	Defendant TRW Inc.'s Notice of Motion and Motion for Judgment as a Matter of Law; Memorandum of Points and Authorities in Support Thereof
54.	8/14/98	Jury Instructions
55.	8/17/98	Judgment on the Verdict for Defendant
56.	8/17/98	Special Verdict Form for Defendant
57.	8/19/98	Receipt of Transcript of Proceedings
58.	8/19/98	Transcript Filed for Proceedings Held on 8/4/98
59.	8/19/98	Transcript Filed for Proceedings Held on 8/5/98

60. 8/19/98 Transcript Filed for Proceedings Held on 8/6/98

61. 8/19/98 Transcript Filed for Proceedings Held on 8/7/98

62. 8/19/98 Transcript Filed for Proceedings Held on 8/11/98

63. 8/19/98 Transcript Filed for Proceedings Held on 8/12/98

64. 8/19/98 Transcript Filed for Proceedings Held on 8/13/98

65. 8/19/98 Transcript Filed for Proceedings Held on 8/14/98

66. 9/14/98 Notice of Appeal to the United States Court of Appeals for the Ninth Circuit

67. 8/11/99 Certification of Record Transmitted

68. 11/29/00 Stipulation and Order to Stay Proceedings in the District Court

69. 12/4/00 Mandate from Court of Appeals Filed

70. 12/4/00 Minutes Staying Case Pending Ruling by United States Supreme Court

II. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 98-56624

1. 9/14/98 Notice of Appeal to the United States Court of Appeals for the Ninth Circuit

2. 3/26/99 Opening Brief of Appellant

3. 7/27/99 Appellee's Answering Brief

4. 8/4/99 Brief of Amicus Curiae Trans Union LLC in Support of TRW Inc. and Affirmance.

5. 9/10/99 Appellant's Reply Brief

6. 1/14/00 Letter Brief from Daniel J. McLoon Advising the Court of a Recent Opinion in *Washington v. CSC Credit Services* That Is Relevant to the Issues Being Addressed in this Appeal

7. 7/17/00 Opinion

8. 7/28/00 Petition for Rehearing by Panel and En Banc; by Appellant

9. 8/7/00 TRW Inc.'s Petition for Rehearing and Rehearing En Banc

10. 9/29/00 Order Denying Petitions for Rehearing, and the Suggestions for Rehearing En Banc

11. 10/4/00 Order and Amended Opinion

12. 10/26/00 Mandate Issued

[Dated October 21, 1996]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT

ADELAIDE ANDREWS,
Plaintiff

v.

TRANS UNION CORPORATION, INC. and TRW, INC.
Defendants.

CASE NO. 96-7369 LGB (VAPx)

COMPLAINT
(DEMAND FOR JURY TRIAL)

Plaintiff, Adelaide Andrews hereby alleges against all Defendants as follows:

I.

JURISDICTION AND VENUE

1. This action arises under 15 U.S.C. §§ 1681b, 1681e(a), 1681e(b) and 1681i(a). Accordingly, jurisdiction in this Court exists under 15 U.S.C. § 1681p and under the general federal question jurisdiction statute, 28 U.S.C. § 1331. Jurisdiction over Plaintiff's supplemental state law cause of action exists under 28 U.S.C. § 1367.

2. Venue is appropriate in this Court under 28 U.S.C. § 1391(b)(2), in that both Defendants reside, as that term is defined in 28 U.S.C. § 1391(b)(3), in the Central District of California and a substantial part of the events giving rise to the claim occurred within the Central District of California.

II.

INTRODUCTION

3. The computerization of our society has resulted in a revolutionary increase in the accumulation and processing of data concerning individual citizens. Data technology, whether it is used by criminal law enforcement, businesses, banks, the Internal Revenue Service or other institutions, allows information concerning individuals to flow immediately to requesting parties. Such timely information is intended to lead to faster and better decisions by its recipients, and all of society should benefit from the resulting convenience and efficiency. Unfortunately, however, individuals can sustain substantial damage whenever inaccurate information is entered into and disseminated from these types of data bases.

4. The ongoing technological advances in the area of data processing have resulted in a boon for the companies that accumulate and sell data concerning individuals' credit histories. Such companies are commonly known as credit reporting agencies ("CRAs," or individually, a "CRA"). Two of the three most prominent of the nation's CRAs are the Defendants in this action. These CRAs sell to readily paying subscribers (i.e., retailers, landlords, lenders, potential employers, and similar interested parties) information, commonly called "credit reports," concerning individuals who may be applying for retail credit, to lease an apartment, to obtain a mortgage or employment, or the like.

5. Since 1970, when Congress enacted the Fair Credit Reporting Act, as amended, 15 U.S.C. §§ 1681 *et seq.* ("FCRA"), federal law has required CRAs to have in place and to utilize reasonable procedures *"to assure the maximum possible accuracy"* of personal financial information in their credit reports. The FCRA sets forth this and many other requirements for CRAs' operations. For example, in addition to requiring that a CRA have in place reasonable procedures to

assure that each credit report will be accurate, the FCRA requires CRAs to reinvestigate information concerning an individual who lodges a dispute with the respective CRA.

6. This action seeks injunctive relief to compel the Defendant CRAs to comply with federal law, as well as compensatory and punitive damages, costs of suit and reasonable attorneys' fees for Plaintiff resulting from Defendants' failure to abide by the requirements of the FCRA. In particular, this action seeks such relief claiming:

(i) that Plaintiff was the victim of a fraud by which a person not previously known by Plaintiff (hereinafter "impostor") misappropriated Plaintiff's Social Security number;

(ii) that said impostor defrauded various commercial enterprises, including retail stores and utilities, and that each of the Defendants, in violation of 15 U.S.C. §§ 1681b and 168le(a), disclosed historical credit information concerning Plaintiff to some or all of the commercial enterprises who were eventually defrauded—which contributed to these enterprises' extension of credit to the person committing the fraud—without maintaining reasonable procedures to assure that Plaintiff's private credit information was furnished only to persons reasonably believed to be using the information in a credit transaction involving Plaintiff;

(iii) that resulting credit delinquencies arising from the fraud were inaccurately attributed to Plaintiff by each of the Defendants, and that each of the Defendants failed to follow reasonable procedures to prevent credit delinquencies arising from such fraud from inaccurately affecting its credit reports concerning Plaintiff, in violation of 15 U.S.C. § 1681e(b); and

(iv) that Defendant Trans Union failed to comply with 15 U.S.C. § 1681i(a) in a timely fashion after Plaintiff disputed, in writing to Trans Union, the credit reports issued by Defendant Trans Union.

7. Based upon each Defendants' violations of the FCRA, Plaintiff has expended significant time and money attempting to correct this situation, and has suffered substantial commercial impairment, inconvenience, emotional distress, including physical manifestations of such distress, embarrassment and humiliation over a period lasting longer than one year. Therefore, Plaintiff now prays for (1) injunctive relief requiring each of the Defendants to adopt reasonable procedures in compliance with the mandates of the FCRA, (2) compensatory and punitive damages from each of the Defendants as more specifically set forth below, (3) reasonable attorneys' fees and costs of suit, and (4) such other relief as the Court may find appropriate.

III.

PARTIES

8. Plaintiff Adelaide Andrews was a resident of Santa Monica, California during the time in which a substantial part of the events or omissions giving rise to the claim occurred. Plaintiff currently resides in Encinitas, California. Plaintiff is informed and believes that, prior to the events giving rise to this action, Plaintiff had not been the subject of the reporting of significant negative financial information by Defendants.

9. Defendant Trans Union Corporation ("Trans Union") is a corporation headquartered in Chicago, Illinois and domiciled in the State of Delaware. Trans Union is in the business of providing credit reports concerning individuals and businesses to commercial users nationwide. Trans Union is a wholly-owned, tiered subsidiary of The Marmon Group, Inc., a privately-held corporation that is also headquartered in Chicago, Illinois and domiciled in the State of Delaware. The

Marmon Group, Inc. generates consolidated revenues in excess of $4 billion annually.

10. Defendant TRW Inc. ("TRW") is a corporation headquartered in Cleveland, Ohio and domiciled in the State of Ohio. Through its TRW Credit Data Division, TRW was, at all times relevant to this complaint, in the business of providing credit reports concerning individuals and businesses to commercial users nationwide. TRW has consolidated revenues in excess of $8 billion annually.

IV.

FACTS

11. On or about May 31, 1995, Plaintiff met with a loan officer at Home Savings to inquire about a residential mortgage. That officer, Kyle Beavert, ordered and received a copy of her credit report through Chase Credit Research. The Chase Credit Research credit report indicated that Defendants TRW and Trans Union were reporting that Plaintiff had a delinquent account with Dillard's Department Store.

12. Plaintiff has never applied for or maintained a consumer credit account with Dillard's.

13. Immediately thereafter, Plaintiff contacted each Defendant by telephone to inform them of this error. During the course of her conversations with Defendants' representatives, Plaintiff learned that she was a victim of identity fraud, in that someone unknown to her had assumed her identity and applied for, and opened, credit accounts in her name.

14. Upon further investigation, Plaintiff learned that the Dillard's account had been opened in Las Vegas, Nevada, by a woman using Plaintiff's Social Security number and representing herself as *Andrea* Andrews, birth date December 9, 1967, and residing at 4201 S. Decatur Blvd., Apartment 2202, Las Vegas, Nevada, 89103. Plaintiff is *Adelaide* Andrews. Her birth date is June 23, 1963, and, at the time of this application for credit, resided at 150 Hollister Avenue, Santa Monica, 90405. Thus, other than the social security number and last name, no other information provided to Dillard's by the impostor in connection with the fraudulently opened account matched Plaintiff's: the first name, driver's license number, credit card account number, date of birth, place of employment, home address and home and work telephone numbers.

15. Armed with only a correct Social Security number and last name, Defendant Trans Union released to Dillard's a credit report permitting the impostor to open an account in Plaintiff's name.

16. Upon further investigation, Plaintiff discovered that four other fraudulent credit accounts, Express Department Stores, Prime Cable of Las Vegas, FCNB Preferred Charge and Commercial Credit, had been opened in Plaintiff's name by an impostor. Each of those accounts were opened by commercial enterprises to whom Defendant TRW had provided Plaintiff's personal credit history. Plaintiff has never transacted business that would have given rise to the credit inquiries of the fraudulent accounts reported by TRW. Upon information and belief, those accounts were opened by commercial enterprises who had no correct identifying information concerning Plaintiff other than her social security number and last name. Upon information and belief, Defendant TRW disclosed Plaintiff's personal credit history, and each of those commercial enterprises opened accounts, based upon the same or similar insufficient indicia of Plaintiff's identity that was utilized to open the Dillard's account.

17. After discovering this apparent fraud, Plaintiff contacted Defendants TRW and Trans Union in writing and by telephone to request that they remove any references to these fraudulent credit accounts. Following these contacts, and within 30 days from her initial contact, Defendant TRW

deleted references from Plaintiff's file to these fraudulent accounts. Defendant Trans Union, however, refused to remove from Plaintiffs file information concerning these fraudulent accounts. Failing to conduct an adequate reinvestigation of Plaintiff's dispute, Defendant Trans Union insisted that the Dillard's account remain on her credit report until Dillard's contacted Trans Union and told them to remove the incorrect information. Defendant Trans Union tried to shift to Plaintiff the responsibility for reinvestigation and for following reasonable procedures to assure maximum possible accuracy by directing her to work with Dillard's to prove that the account was fraudulent.

18. Although the notice of delinquent account status regarding Dillard's has since been removed from Plaintiff's Trans Union file, Dillard's is still identified on Plaintiff's consumer file disclosure as a retailer who made an inquiry concerning Plaintiff's credit status.

19. As a direct result of the failure on the part of each of the Defendants to fulfill their respective obligations under the FCRA, Plaintiff has expended significant amounts of time and money and has suffered substantial and long-standing commercial impairment, inconvenience, emotional distress, including physical manifestations of such distress, embarrassment and humiliation.

20. There now exists an actual controversy between Plaintiff and each of Defendants regarding each Defendant's duty under the FCRA and their fulfillment thereof.

21. Unless enjoined, Defendants will continue to engage in the unlawful acts described above. Plaintiff has no adequate remedy at law. Plaintiff is now suffering and will continue to suffer irreparable injury from the acts of each Defendant unless relief is provided by this Court.

V.

FIRST CLAIM

FOR VIOLATION OF 15 U.S.C §§ 1681b and 1681e(a)

(Against Both Defendants)

22. Plaintiff incorporates by reference every allegation set forth above in paragraphs 1 through 21.

23. Defendants Trans Union and TRW have each furnished consumer reports concerning Plaintiff to commercial enterprises, without reasonable grounds for believing that the consumer reports were to be used in connection with a credit transaction involving Plaintiff, in violation of 15 U.S.C. §§ 1681b and 1681e(a).

24. On information and belief, Defendants' respective failure to comply with the requirements of 15 U.S.C. § 168le(a) concerning Plaintiff was willful, in that each refused, in conscious disregard of the rights of Plaintiff, to implement and maintain reasonable procedures to ensure that Plaintiff's confidential consumer credit information would not be disclosed without reasonable grounds for believing that the consumer reports were to be used in connection with a credit transaction involving Plaintiff.

25. As a result of Defendants' respective actions and/or omissions contrary to 15 U.S.C. §§ 1681b and 168le(a), Plaintiff has suffered damages, including, without limitation, a significant expenditure of time and money, commercial impairment, inconvenience, embarrassment, humiliation and emotional distress, including physical manifestations of such distress, over a period lasting longer than one year, in an amount according to proof.

26. As a result of Defendants' respective actions and omissions contrary to 15 U.S.C. §§ 1681b and 1681e(a), Plaintiff is entitled to: (i) injunctive relief requiring Defendants

to adopt reasonable procedures in compliance with the mandate of 15 U.S.C. §§ 1681b and 1681e(a), in as much as Defendants' respective procedures pose an imminent threat of recurrence of injury, (ii) actual damages sustained by Plaintiff pursuant to 15 U.S.C. § 168lo(1); (iii) punitive damages pursuant to 15 U.S.C. § 1681n(2); and (iv) reasonable attorneys' fees and costs of suit pursuant to 15 U.S.C. § 1681o(2).

VI.

SECOND CLAIM

FOR VIOLATION OF 15 U.S.C § 1681e(b)

(Against Both Defendants)

27. Plaintiff incorporates by reference every allegation set forth above in paragraphs 1 through 21.

28. Defendants Trans Union and TRW have each failed to maintain and follow "reasonable procedures to assure maximum possible accuracy of the information concerning" Plaintiff, in violation of 15 U.S.C. § 1681e(b).

29. On information and belief, Defendants' respective failure to comply with the requirements of 15 U.S.C. § 1681e(b) concerning Plaintiff was willful, in that they each refused, in conscious disregard of the rights of Plaintiff, to implement and maintain reasonable procedures to ensure maximum possible accuracy.

30. As a result of Defendants' respective actions and/or omissions contrary to 15 U.S.C. § 1681e(b), Plaintiff has suffered damages, including, without limitation, expenditure of significant time and money, commercial impairment, inconvenience, embarrassment, humiliation and emotional distress, including physical manifestations of such distress, over a period lasting longer than one year, in an amount according to proof. As a result of Defendants' respective actions and omissions contrary to 15 U.S.C. § 1681e(b), Plaintiff is entitled to: (i) injunctive relief requiring Defendants to adopt reasonable procedures in compliance with the mandate of 15 U.S.C. § 168le(b), in as much as Defendants' respective procedures pose an imminent threat of recurrence of injury; (ii) actual damages sustained by Plaintiff pursuant to 15 U.S.C. § 1681o(1); (iii) punitive damages pursuant to 15 U.S.C. § 1681n(2); and (iv) reasonable attorneys' fees and costs of suit pursuant to 15 U.S.C. § 168lo(2).

VII.

THIRD CLAIM

FOR VIOLATION OF 15 U.S.C. § 1681i(a)

(Against Defendant Trans Union)

31. Plaintiff incorporates by reference every allegation set forth above in paragraphs 1 through 21.

32. Defendant Trans Union has failed to (i) reasonably reinvestigate—within a reasonable amount of time following Plaintiff's correspondence disputing such information—information inaccurately attributed to Plaintiff, and (ii) promptly delete such misinformation as could not be verified, all in violation of 15 U.S.C. § 168li(a).

33. On information and belief, Defendant Trans Union's failure to comply with the requirements of 15 U.S.C. § 168li(a) concerning Plaintiff was willful, in that it refused, in conscious disregard of the rights of Plaintiff, to conduct a reasonable reinvestigation and remove inaccurate information from reports concerning Plaintiff following Plaintiff's having repeatedly disputed said inaccurate information.

34. As a result of Defendant Trans Union's actions and/or omissions contrary to 15 U.S.C. § 1681i(a), Plaintiff has suffered harm, including, without limitation, expenditure of significant time and money, commercial impairment,

inconvenience, embarrassment, humiliation and emotional distress, including physical manifestations of such distress, over a period lasting longer than one year, in an amount according to proof.

35. As a result of Defendant Trans Union's actions or omissions contrary to 15 U.S.C. § 168li(a), Plaintiff is entitled to: (i) injunctive relief requiring Defendant Trans Union to adopt and implement reasonable procedures in compliance with the mandate of 15 U.S.C. § 168li(a), in as much as the Defendant Trans Union's procedures pose an imminent threat of recurrence of injury to Plaintiff; (ii) actual damages sustained by Plaintiff pursuant to 15 U.S.C. § 168lo(l) or 15 U.S.C. § 1681n(1); (iii) punitive damages pursuant to 15 U.S.C. § 1681n(2); and (iv) reasonable attorneys' fees and costs of suit pursuant to 15 U.S.C. § 1681o(2) or 15 U.S.C. § 168ln(3).

VIII.

FOURTH CLAIM

FOR VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE §§ 17200 ET SEQ.

(Against Both Defendants)

36. Plaintiff incorporates by reference every allegation set forth above in paragraphs 1 through 35.

37. Defendants' acts and omissions alleged are a violation of statutory requirements as described above in Claims One, Two and Three and therefore constitute a violation of California Business & Professions Code sections 17200 *et seq.*

38. Plaintiff seeks judgment relief on her own behalf, as well as on behalf of the general public pursuant to Business & Professions Code section 17204.

39. Failure to enjoin Defendants' acts and/or failures to act would result in irreparable injury and Plaintiff has no other adequate remedy at law.

40. As a result of Defendants' acts and/or failures to act contrary to California Business & Professions Code sections 17200 *et seq.*, Plaintiff is entitled to injunctive relief, on her own behalf and on behalf of the general public, pursuant to Business & Professions Code sectior 17203, and to disgorgement of any contribution to Defendants' profits resulting from Defendants' unlawful acts or failures to act.

IX.

DEMAND FOR JURY TRIAL

41. Plaintiff hereby demands a jury trial.

X.

PRAYER

42. Plaintiff prays for judgment against Defendants Trans Union and TRW as follows:

(1) Injunctive relief requiring Defendants Trans Union and TRW to adopt and implement reasonable procedures in compliance with the mandates of 15 U.S.C. §§ 168lb, 1681e(a) and 168le(b), including, without limitation, requiring a sufficient number of corresponding points of reference before (i) disseminating an individual's credit history to an inquiring party who is using such information in connection with the extension of credit, or (iii) attributing information to an individual's credit file;

(2) Injunctive relief requiring Defendant Trans Union to adopt and implement reasonable procedures in compliance with the mandates of 15 U.S.C. § 168li(a), including, without limitation, procedures to assure that information related to the misappropriation of an individual's identity is promptly

reinvestigated in a manner sufficient to reveal and correct misinformation;

(3) A declaration that each Defendant has failed to maintain and implement procedures that comply the applicable federal credit reporting laws;

(4) Actual damages against each Defendant in an amount to be determined at trial;

(5) Punitive damages against each Defendant in an amount to be determined at trial;

(6) Disgorgement of any contribution to profits resulting from Defendants' failure to comply with California Business & Professions Code §§ 17200 *et seq.;*

(7) Reasonable attorneys' fees and costs of suit from Defendants pursuant to either 15 U.S.C. § 168lo(2) or 15 U.S.C. § 1681n(3) and California Code of Civil Procedure section 1021.5;

(8) Such other relief as the Court may deem proper.

Dated: October 21, 1996

HALL & ASSOCIATES
Carlyle W. Hall, Jr.
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Gus T. May
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By: /s/ Gus T. May
Gus T. May
Attorneys for Plaintiff

[Dated March 13, 1997]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ADELAIDE ANDREWS,
Plaintiff,
v.
TRANS UNION CORPORATION, INC. and TRW, INC.,
Defendants.

CASE NO. 96-7369 LGB(VAPx)

ANSWER OF DEFENDANT TRW INC. TO PLAINTIFF'S COMPLAINT

NOW COMES defendant TRW Inc. (hereinafter referred to as "TRW"), an Ohio corporation, for itself and itself alone, and severing itself from the remaining defendants in answer to Plaintiff's complaint herein (hereinafter referred to as the "Complaint"), and avers as follows:

1. In response to paragraph 1 of the Complaint, TRW admits the factual averments contained therein.

2. In response to paragraph 2 of the Complaint, TRW admits the factual averments contained therein.

3. In response to paragraph 3 of the Complaint, TRW avers that the paragraph contains numerous expressions of opinion rather than averments of fact, and as such are incapable of admission or denial. For example, the characterization of alleged changes as "revolutionary" is not an objective fact that can either be admitted or denied. To the extent that these averments relate to "data," "data technology," and "data bases" that do not involve consumer credit information maintained by credit reporting agencies, TRW is without knowledge or information sufficient to form a belief as to the truth of such

factual averments and, on that basis, denies each and every such factual averment. Except as otherwise admitted expressly in this response, TRW denies each and every remaining factual averment in paragraph 3 of the Complaint.

4. In response to paragraph 4 of the Complaint, TRW denies that it currently is a credit reporting agency. TRW admits that, prior to September 19, 1996, it was a credit reporting agency and that, prior to that same date, TRW could accurately be described as one of the country's three largest credit reporting agencies. TRW admits that, during the period it was a credit reporting agency, it allowed subscribers access to its consumer credit files for specified fees and on terms and conditions established by written agreements with such subscribers, which terms and conditions were consistent with the provisions of the Fair Credit Reporting Act. Except as otherwise admitted expressly in this response, TRW denies each and every remaining factual averment contained in paragraph 4 of the Complaint.

5. In response to paragraph 5 of the Complaint, TRW avers that the provisions of the Fair Credit Reporting Act and their application are legal matters and not factual matters that are capable of admission or denial. Except as otherwise admitted expressly in this response, TRW denies each and every remaining factual averment contained in paragraph 5 of the Complaint.

6. In response to paragraph 6 of the Complaint, TRW avers that the relief plaintiff is seeking in this action is set forth in her Complaint, the contents of which speak for themselves. Except as otherwise admitted expressly in this response, TRW denies each and every factual averment contained in the first sentence of paragraph 6. TRW is without knowledge or information sufficient to form a belief as to the truth of the factual averments contained in paragraph 6(i) and, on that basis, denies each such factual averment. TRW denies each and every factual averment contained in paragraphs 6(ii)-(iv) to the extent that such averments are directed to TRW. To the extent that the averments contained in paragraphs 6(ii)-(iv) relate to a credit reporting agency other than TRW, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment. Except as otherwise admitted expressly herein, TRW denies each and every remaining factual averment contained in paragraph 6 of the Complaint.

7. In response to paragraph 7 of the Complaint, TRW avers that the relief plaintiff is seeking in this action is set forth in her Complaint, the contents of which speak for themselves, but TRW denies that plaintiff is entitled to any relief whatsoever from TRW. To the extent that the averments contained in paragraph 7 relate to a credit reporting agency other than TRW, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment. Except as otherwise admitted expressly herein, TRW denies each and every remaining factual averment contained in paragraph 7 of the Complaint.

8. In response to paragraph 8 of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

9. In response to paragraph 9 of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such averment.

10. In response to paragraph 10 of the Complaint, TRW admits that it is and, at all times relevant hereto, has been an Ohio corporation, with its principal place of business in Ohio. TRW further admits that, prior to September 19, 1996, it was a credit reporting agency and, as such, provided credit reports

to its subscribers nationwide. TRW further admits that, in its last fiscal year, it had consolidated revenues in excess of $8 billion. Except as specifically admitted herein, TRW generally and specifically denies each and every remaining factual averment in paragraph 10 of the Complaint.

11. In response to paragraph 11 of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such averment.

12. In response to paragraph 12 of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

13. In response to paragraph 13 of the Complaint, TRW admits that Plaintiff contacted TRW by telephone on May 31, 1995, and requested a disclosure of her credit profile. As to the remaining factual averments in this paragraph of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

14. In response to paragraph 14 of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

15. In response to paragraph 15 of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

16. In response to paragraph 16 of the Complaint, TRW admits that it has provided credit reports containing certain of Plaintiff's credit information to Express Department Stores, Prime Cable of Las Vegas, FCNB Preferred Charge and Commercial Credit. As to the remaining factual averments in this paragraph of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

17. In response to paragraph 17 of the Complaint, TRW admits that it performed a prompt reinvestigation at Plaintiff's request of items of information appearing on Plaintiff's credit profile in response to disputes submitted by Plaintiff, and that such reinvestigation complied with applicable state and federal law. As a result of its reinvestigation, TRW was unable to verify the accuracy of certain items of credit information that appeared in Plaintiff's credit profile and, as such, TRW deleted such information from Plaintiff's credit profile. As to the remaining factual averments in this paragraph of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

18. In response to paragraph 18 of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

19. In response to paragraph 19 of the Complaint, TRW denies each and every factual averment contained therein to the extent such averments are directed to TRW. As to the remaining factual averments in this paragraph of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

20. In response to paragraph 20 of the Complaint, TRW denies each and every factual averment contained therein to the extent such averments are directed to TRW. As to the remaining factual averments in this paragraph of the Complaint, TRW is without knowledge or information sufficient to form

a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

21. In response to paragraph 21 of the Complaint, TRW denies each and every factual averment contained therein to the extent such averments are directed to TRW, and further denies that Plaintiff has been injured or damaged as a proximate consequence of any act or omission of TRW. As to the remaining factual averments in this paragraph of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

22. In response to paragraph 22 of the Complaint, TRW incorporates herein by reference its responses to paragraphs 1 through 21 above.

23. In response to paragraph 23 of the Complaint, TRW denies each and every factual averment contained therein to the extent such averments are directed to TRW. As to the remaining factual averments in this paragraph of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

24. In response to paragraph 24 of the Complaint, TRW denies each and every factual averment contained therein to the extent such averments are directed to TRW. As to the remaining factual averments in this paragraph of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

25. In response to paragraph 25 of the Complaint, TRW denies each and every factual averment contained therein to the extent such averments are directed to TRW, and further denies that Plaintiff has been injured or damaged as a proximate consequence of any act or omission of TRW. As to the remaining factual averments in this paragraph of the Complaint,

TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

26. In response to paragraph 26 of the Complaint, TRW denies each and every factual averment contained therein to the extent such averments are directed to TRW, and further denies that Plaintiff has been injured or damaged as a proximate consequence of any act or omission of TRW. As to the remaining factual averments in this paragraph of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

27. In response to paragraph 27 of the Complaint, TRW incorporates herein by reference its responses to paragraphs 1 through 21 above.

28. In response to paragraph 28 of the Complaint, TRW denies each and every factual averment contained therein to the extent such averments are directed to TRW. As to the remaining factual averments in this paragraph of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

29. In response to paragraph 29 of the Complaint, TRW denies each and every factual averment contained therein to the extent such averments are directed to TRW. As to the remaining factual averments in this paragraph of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

30. In response to paragraph 30 of the Complaint, TRW denies each and every factual averment contained therein to the extent such averments are directed to TRW, and further denies that Plaintiff has been injured or damaged as a proximate consequence of any act or omission of TRW. As to the

remaining factual averments in this paragraph of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

31. In response to paragraph 31 of the Complaint, TRW incorporates herein by reference its responses to paragraphs 1 through 21 above.

32. In response to paragraph 32 of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

33. In response to paragraph 33 of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

34. In response to paragraph 34 of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

35. In response to paragraph 35 of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

36. In response to paragraph 36 of the Complaint, TRW incorporates herein by reference its responses to paragraphs 1 through 35 above.

37. In response to paragraph 37 of the Complaint TRW denies each and every factual averment contained therein to the extent such averments are directed to TRW. As to the remaining factual averments in this paragraph of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

38. In response to paragraph 38 of the Complaint, TRW admits that Plaintiff seeks judgment relief on her own behalf, as well as on behalf of the general public pursuant to Business & Professions Code section 17204. Except as specifically admitted herein, TRW generally and specifically denies each and every remaining factual averment in paragraph 38 of the Complaint.

39. In response to paragraph 39 of the Complaint, TRW denies each and every factual averment contained therein to the extent such averments are directed to TRW. As to the remaining factual averments in this paragraph of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

40. In response to paragraph 40 of the Complaint, TRW denies each and every factual averment contained therein to the extent such averments are directed to TRW. As to the remaining averments in this paragraph of the Complaint, TRW is without knowledge or information sufficient to form a belief as to the truth of such factual averments and, on that basis, denies each and every such factual averment.

41. In response to paragraph 41 of the Complaint, TRW avers that Plaintiff has purported to demand a jury trial, but has not done so in the proper format. TRW further denies that Plaintiff is entitled to a jury trial with respect to certain claims and forms of requested relief contained in the Complaint.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Failure To State A Claim)

42. The First Claim of Plaintiff's Complaint fails to state a claim upon which relief may be granted in favor of Plaintiff and against TRW.

SECOND AFFIRMATIVE DEFENSE

(Failure To State A Claim)

43. The Second Claim of Plaintiff's Complaint fails to state a claim upon which relief may be granted in favor of Plaintiff and against TRW.

THIRD AFFIRMATIVE DEFENSE

(Failure To State A Claim)

44. The Fourth Claim of Plaintiff's Complaint fails to state a claim upon which relief may be granted in favor of Plaintiff and against TRW.

FOURTH AFFIRMATIVE DEFENSE

(Acts Of Third Parties)

45. TRW alleges that any purported damages to Plaintiff are the result of acts or omissions of third persons over and with respect to whom TRW had neither control nor responsibility.

FIFTH AFFIRMATIVE DEFENSE

(Comparative Fault)

46. Upon information and belief, Plaintiff was negligent, careless, or otherwise at fault in and about the matters referenced in the Complaint, and such negligence, carelessness or fault proximately caused or contributed to the events, injuries, and damages complained of by Plaintiff, if any there were, and either bars or proportionally reduces any potential recovery of Plaintiff.

SIXTH AFFIRMATIVE DEFENSE

(Failure To Mitigate)

47. Upon information and belief, Plaintiff has failed and neglected to use reasonable care to protect herself to minimize losses and damages complained of, if any there were, and is therefore barred from recovery of such damages, if any.

SEVENTH AFFIRMATIVE DEFENSE

(Contribution And Indemnity)

48. In the event TRW has liability to Plaintiff, which liability is expressly denied, and in the event any other party is determined to be liable, TRW is entitled to percentage contribution or to partial or total equitable indemnity from such party, in accordance with the principles of equitable indemnity and comparative contribution.

EIGHTH AFFIRMATIVE DEFENSE

(Statute Of Limitations)

49. Any and all claims for relief in the Complaint herein are barred by the provisions of 15 U.S.C. § 1681p, the applicable statute of limitations.

WHEREFORE, Defendant TRW Inc. prays as follows:

1. That Plaintiff take nothing by virtue of the Complaint herein and that this action be dismissed in its entirety;
2. For costs of suit; and
3. For such other and further relief as the Court may deem just and proper.

Dated: March 13, 1997

JONES, DAY, REAVIS &
POGUE

By: /s/ Kevin R. Lussier
Kevin R. Lussier
Attorneys for Defendant
TRW INC.

UNITED STATES CODE
TITLE 15. COMMERCE AND TRADE
CHAPTER 41– CONSUMER CREDIT PROTECTION
SUBCHAPTER III – CREDIT REPORTING AGENCIES

§ 1681. Congressional findings and statement of purpose

(a) Accuracy and fairness of credit reporting

The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) Reasonable procedures

It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

§ 1681a. Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) Consumer report.

(1) In general. The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for –

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

(2) Exclusions. The term "consumer report" does not include –

(A) any –

(i) report containing information solely as to transactions or experiences between the consumer and the person making the report;

(ii) communication of that information among persons related by common ownership or affiliated by corporate control; or

(iii) communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons;

(B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device;

(C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person makes the disclosures to the consumer required under section 1681m of this title; or

(D) a communication described in subsection (o) of this section.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(g) The term "file", when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

(h) The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

(i) The term "medical information" means information or records obtained, with the consent of the individual to whom it relates, from licensed physicians or medical practitioners, hospitals, clinics, or other medical or medically related facilities.

(j) Definitions relating to child support obligations

(1) Overdue support

The term "overdue support" has the meaning given to such term in section 666(e) of Title 42.

(2) State or local child support enforcement agency

The term "State or local child support enforcement agency" means a State or local agency which administers a State or local program for establishing and enforcing child support obligations.

(k) Adverse action.

(1) Actions included. The term "adverse action" –

(A) has the same meaning as in section 1691(d)(6)of this title; and

(B) means –

(i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;

(ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;

(iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 1681b(a)(3)(D) of this title; and

(iv) an action taken or determination that is –

(I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account under section 1681b(a)(3)(F)(ii) of this title; and

(II) adverse to the interests of the consumer.

(2) Applicable findings, decisions, commentary, and orders. For purposes of any determination of whether an action is an adverse action under paragraph (1)(A), all appropriate final findings, decisions, commentary, and orders issued under section 1691(d)(6) of this title by the Board of Governors of the Federal Reserve System or any court shall apply.

(l) Firm offer of credit or insurance. The term "firm offer of credit or insurance" means any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer, except that the offer may be further conditioned on one or more of the following:

(1) The consumer being determined, based on information in the consumer's application for the credit or insurance, to meet specific criteria bearing on credit worthiness or insurability, as applicable, that are established –

(A) before selection of the consumer for the offer; and

(B) for the purpose of determining whether to extend credit or insurance pursuant to the offer.

(2) Verification –

(A) that the consumer continues to meet the specific criteria used to select the consumer for the offer, by using information in a consumer report on the consumer, information in the consumer's application for the credit or insurance, or other information bearing on the credit worthiness or insurability of the consumer; or

(B) of the information in the consumer's application for the credit or insurance, to determine that the consumer meets the specific criteria bearing on credit worthiness or insurability.

(3) The consumer furnishing any collateral that is a requirement for the extension of the credit or insurance that was –

(A) established before selection of the consumer for the offer of credit or insurance; and

(B) disclosed to the consumer in the offer of credit or insurance.

(m) Credit or insurance transaction that is not initiated by the consumer. The term "credit or insurance transaction that is not initiated by the consumer" does not include the use of a consumer report by a person with which the consumer has an account or insurance policy, for purposes of –

(1) reviewing the account or insurance policy; or

(2) collecting the account.

(n) State. The term "State" means any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

(o) Excluded communications. A communication is described in this subsection if it is a communication –

(1) that, but for subsection (d)(2)(D) of this section, would be an investigative consumer report;

(2) that is made to a prospective employer for the purpose of –

(A) procuring an employee for the employer; or

(B) procuring an opportunity for a natural person to work for the employer;

(3) that is made by a person who regularly performs such procurement;

(4) that is not used by any person for any purpose other than a purpose described in subparagraph (A) or (B) of paragraph (2); and

(5) with respect to which –

(A) the consumer who is the subject of the communication –

(i) consents orally or in writing to the nature and scope of the communication, before the collection of any information for the purpose of making the communication;

(ii) consents orally or in writing to the making of the communication to a prospective employer, before the making of the communication; and

(iii) in the case of consent under clause (i) or (ii) given orally, is provided written confirmation of that consent by the person making the communication, not later than 3 business days after the receipt of the consent by that person;

(B) the person who makes the communication does not, for the purpose of making the communication, make any inquiry that if made by a prospective employer of the consumer who is the subject of the communication would violate any applicable Federal or State equal employment opportunity law or regulation; and

(C) the person who makes the communication –

(i) discloses in writing to the consumer who is the subject of the communication, not later than 5 business days after receiving any request from the consumer for such disclosure, the nature and substance of all information in the consumer's file at the time of the request, except that the sources of any information that is acquired solely for use in making the communication and is actually used for no other purpose, need not be disclosed other than under appropriate discovery procedures in any court of competent jurisdiction in which an action is brought; and

(ii) notifies the consumer who is the subject of the communication, in writing, of the consumer's right to request the information described in clause (i).

(p) Consumer reporting agency that compiles and maintains files on consumers on a nationwide basis. The term "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis" means a consumer reporting agency that regularly engages in the practice of assembling or evaluating, and maintaining, for the purpose of furnishing consumer reports to third parties bearing on a consumer's credit worthiness, credit standing, or credit capacity, each of the following regarding consumers residing nationwide:

(1) Public record information.

(2) Credit account information from persons who furnish that information regularly and in the ordinary course of business.

§ 1681b. Permissible purposes of consumer reports

(a) In general. Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe –

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the information –

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that –

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;

(B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);

(C) the person has provided at least 10 days' prior notice to the consumer whose report is requested, by certified or registered mail to the last known address of the consumer, that the report will be requested; and

(D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under section 654 of Title 42 for use to set an initial or modified child support award.

(b) Conditions for furnishing and using consumer reports for employment purposes.

(1) Certification from user. A consumer reporting agency may furnish a consumer report for employment purposes only if –

(A) the person who obtains such report from the agency certifies to the agency that –

(i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and

(ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report, or has previously provided, a summary of the consumer's rights under this subchapter, as prescribed by the Federal Trade Commission under section 1681g(c)(3) of this title.

(2) Disclosure to consumer

(A) In general

Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless –

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

(B) Application by mail, telephone, computer, or other similar means

If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, at any time before a consumer report is procured or caused to be procured in connection with that application –

(i) the person who procures the consumer report on the consumer for employment purposes shall provide to the consumer, by oral, written, or electronic means, notice that a consumer report may be obtained for employment purposes, and a summary of the consumer's rights under section 1681m(a)(3) of this title; and

(ii) the consumer shall have consented, orally, in writing, or electronically to the procurement of the report by that person.

(C) Scope

Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if –

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(3) Conditions on use for adverse actions

(A) In general

Except as provided in subparagraph (B), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates –

(i) a copy of the report; and

(ii) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Federal Trade Commission under section 1681g(c)(3) of this title.

(B) Application by mail, telephone, computer, or other similar means

(i) If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, and if a person who has procured a consumer

report on the consumer for employment purposes takes adverse action on the employment application based in whole or in part on the report, then the person must provide to the consumer to whom the report relates, in lieu of the notices required under subparagraph (A) of this section and under section 1681m(a) of this title, within 3 business days of taking such action, an oral, written or electronic notification –

(I) that adverse action has been taken based in whole or in part on a consumer report received from a consumer reporting agency;

(II) of the name, address and telephone number of the consumer reporting agency that furnished the consumer report (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis);

(III) that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide to the consumer the specific reasons why the adverse action was taken; and

(IV) that the consumer may, upon providing proper identification, request a free copy of a report and may dispute with the consumer reporting agency the accuracy or completeness of any information in a report.

(ii) If, under clause (B)(i)(IV), the consumer requests a copy of a consumer report from the person who procured the report, then, within 3 business days of receiving the consumer's request, together with proper identification, the person must send or provide to the consumer a copy of a report and a copy of the consumer's rights as prescribed by the Federal Trade Commission under section 1681g(c)(3) of this title.

(C) Scope

Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if –

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(4) Exception for national security investigations.

(A) In general. In the case of an agency or department of the United States Government which seeks to obtain and use a consumer report for employment purposes, paragraph (3) shall not apply to any adverse action by such agency or department which is based in part on such consumer report, if the head of such agency or department makes a written finding that –

(i) the consumer report is relevant to a national security investigation of such agency or department;

(ii) the investigation is within the jurisdiction of such agency or department;

(iii) there is reason to believe that compliance with paragraph (3) will –

(I) endanger the life or physical safety of any person;

(II) result in flight from prosecution;

(III) result in the destruction of, or tampering with, evidence relevant to the investigation;

(IV) result in the intimidation of a potential witness relevant to the investigation;

(V) result in the compromise of classified information; or

(VI) otherwise seriously jeopardize or unduly delay the investigation or another official proceeding.

(B) Notification of consumer upon conclusion of investigation. Upon the conclusion of a national security investigation described in subparagraph (A), or upon the determination that the exception under subparagraph (A) is no longer required for the reasons set forth in such subparagraph, the official exercising the authority in such subparagraph shall provide to the consumer who is the subject of the consumer report with regard to which such finding was made –

(i) a copy of such consumer report with any classified information redacted as necessary;

(ii) notice of any adverse action which is based, in part, on the consumer report; and

(iii) the identification with reasonable specificity of the nature of the investigation for which the consumer report was sought.

(C) Delegation by head of agency or department. For purposes of subparagraphs (A) and (B), the head of any agency or department of the United States Government may delegate his or her authorities under this paragraph to an official of such agency or department who has personnel security responsibilities and is a member of the Senior Executive Service or equivalent civilian or military rank.

(D) Report to the congress. Not later than January 31 of each year, the head of each agency and department of the United States Government that exercised authority under this paragraph during the preceding year shall submit a report to the Congress on the number of times the department or agency exercised such authority during the year.

(E) Definitions. For purposes of this paragraph, the following definitions shall apply:

(i) Classified information. The term "classified information" means information that is protected from unauthorized disclosure under Executive Order No. 12958 or successor orders.

(ii) National security investigation. The term "national security investigation" means any official inquiry by an agency or department of the United States Government to determine the eligibility of a consumer to receive access or continued access to classified information or to determine whether classified information has been lost or compromised.

(c) Furnishing reports in connection with credit or insurance transactions that are not initiated by the consumer.

(1) In general. A consumer reporting agency may furnish a consumer report relating to any consumer pursuant to subparagraph (A) or (C) of subsection (a)(3) of this section in connection with any credit or insurance transaction that is not initiated by the consumer only if –

(A) the consumer authorizes the agency to provide such report to such person; or

(B) (i) the transaction consists of a firm offer of credit or insurance;

(ii) the consumer reporting agency has complied with subsection (e) of this section; and

(iii) there is not in effect an election by the consumer, made in accordance with subsection (e) of this section, to have the consumer's name and address excluded from lists of names provided by the agency pursuant to this paragraph.

(2) Limits on information received under paragraph (1)(B). A person may receive pursuant to paragraph (1)(B) only –

(A) the name and address of a consumer;

(B) an identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer; and

(C) other information pertaining to a consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity.

(3) Information regarding inquiries. Except as provided in section 1681g(a)(5) of this title, a consumer reporting agency shall not furnish to any person a record of inquiries in connection with a credit or insurance transaction that is not initiated by a consumer.

(d) reserved

(e) Election of consumer to be excluded from lists.

(1) In general. A consumer may elect to have the consumer's name and address excluded from any list provided by a consumer reporting agency under subsection (c)(1)(B) of this section in connection with a credit or insurance transaction that is not initiated by the consumer, by notifying the agency in accordance with paragraph (2) that the consumer does not consent to any use of a consumer report relating to the consumer in connection with any credit or insurance transaction that is not initiated by the consumer.

(2) Manner of notification. A consumer shall notify a consumer reporting agency under paragraph (1) –

(A) through the notification system maintained by the agency under paragraph (5); or

(B) by submitting to the agency a signed notice of election form issued by the agency for purposes of this subparagraph.

(3) Response of agency after notification through system. Upon receipt of notification of the election of a consumer under paragraph (1) through the notification system maintained by the agency under paragraph (5), a consumer reporting agency shall –

(A) inform the consumer that the election is effective only for the 2-year period following the election if the consumer does not submit to the agency a signed notice of election form issued by the agency for purposes of paragraph (2)(B); and

(B) provide to the consumer a notice of election form, if requested by the consumer, not later than 5 business days after receipt of the notification of the election through the system established under paragraph (5), in the case of a request made at the time the consumer provides notification through the system.

(4) Effectiveness of election. An election of a consumer under paragraph (1) –

(A) shall be effective with respect to a consumer reporting agency beginning 5 business days after the date on which the consumer notifies the agency in accordance with paragraph (2);

(B) shall be effective with respect to a consumer reporting agency –

(i) subject to subparagraph (C), during the 2-year period beginning 5 business days after the date on which the consumer notifies the agency of the election, in the case of an election for which a consumer notifies the agency only in accordance with paragraph (2)(A); or

(ii) until the consumer notifies the agency under subparagraph (C), in the case of an election for which a consumer notifies the agency in accordance with paragraph (2)(B);

(C) shall not be effective after the date on which the consumer notifies the agency, through the notification system established by the agency under paragraph (5), that the election is no longer effective; and

(D) shall be effective with respect to each affiliate of the agency.

(5) Notification system.

(A) In general. Each consumer reporting agency that, under subsection (c)(1)(B) of this section, furnishes a consumer report in connection with a credit or insurance transaction that is not initiated by a consumer, shall –

(i) establish and maintain a notification system, including a toll-free telephone number, which permits any consumer whose consumer report is maintained by the agency to notify the agency, with appropriate identification, of the consumer's election to have the consumer's name and address excluded from any such list of names and addresses provided by the agency for such a transaction; and

(ii) publish by not later than 365 days after September 30, 1996, and not less than annually thereafter, in a publication of general circulation in the area served by the agency –

(I) a notification that information in consumer files maintained by the agency may be used in connection with such transactions; and

(II) the address and toll-free telephone number for consumers to use to notify the agency of the consumer's election under clause (i).

(B) Establishment and maintenance as compliance. Establishment and maintenance of a notification system (including a toll-free telephone number) and publication by a consumer reporting agency on the agency's own behalf and on behalf of any of its affiliates in accordance with this paragraph is deemed to be compliance with this paragraph by each of those affiliates.

(6) Notification system by agencies that operate nationwide. Each consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall establish and maintain a notification system for purposes of paragraph (5) jointly with other such consumer reporting agencies.

(f) Certain use or obtaining of information prohibited. A person shall not use or obtain a consumer report for any purpose unless –

(1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and

(2) the purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification.

(g) Furnishing reports containing medical information. A consumer reporting agency shall not furnish for employment purposes, or in connection with a credit or insurance transaction, a consumer report that contains medical

information about a consumer, unless the consumer consents to the furnishing of the report.

§ 1681c. Reporting of requirements relating to information contained in consumer reports prohibited

(a) Information excluded from consumer reports. Prohibited items

Except as authorized under subsection (b) of this section, no consumer reporting agency may make any consumer report containing any of the following items of information:

(1) cases under Title 11 or under the Bankruptcy Act that, from the date of entry of the order for relief or the date of adjudication, as the case may be, antedate the report by more than 10 years.

(2) Civil suits, civil judgments, and records of arrest that, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.

(3) Paid tax liens which, from date of payment, antedate the report by more than seven years.

(4) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years.

(5) Any other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years.

(6) Redesignated (5)

(b) Exempted cases

The provisions of subsection (a) of this section are not applicable in the case of any consumer credit report to be used in connection with –

(1) a credit transaction involving, or which may reasonably be expected to involve, a principal amount of $150,000 or more;

(2) the underwriting of life insurance involving, or which may reasonably be expected to involve, a face amount of $150,000 or more; or

(3) the employment of any individual at an annual salary which equals, or which may reasonably be expected to equal 75,000, or more.

(c) Running of reporting period

(1) In general. The 7-year period referred to in paragraphs (4) and (6) of subsection (a) of this section shall begin, with respect to any delinquent account that is placed for collection (internally or by referral to a third party, whichever is earlier), charged to profit and loss, or subjected to any similar action, upon the expiration of the 180-day period beginning on the date of the commencement of the delinquency which immediately preceded the collection activity, charge to profit and loss, or similar action.

(2) Effective date. Paragraph (1) shall apply only to items of information added to the file of a consumer on or after the date that is 455 days after September 30, 1996.

(d) Information required to be disclosed

Any consumer reporting agency that furnishes a consumer report that contains information regarding any case involving the consumer that arises under Title 11, shall include in the report an identification of the chapter of such Title 11 under which such case arises if provided by the source of the information. If any case arising or filed under Title 11, is withdrawn by the consumer before a final judgment, the consumer reporting agency shall include in the report that such case or filing was withdrawn upon receipt of documentation certifying such withdrawal.

(e) Indication of closure of account by consumer

If a consumer reporting agency is notified pursuant to section 1681s-2(a)(4) of this title that a credit account of a consumer was voluntarily closed by the consumer, the agency shall indicate that fact in any consumer report that includes information related to the account.

(f) Indication of dispute by consumer

If a consumer reporting agency is notified pursuant to section 1681s-2(a)(3) of this title that information regarding a consumer who was furnished to the agency is disputed by the consumer, the agency shall indicate that fact in each consumer report that includes the disputed information.

§ 1681d. Disclosure of investigative consumer reports

(a) Disclosure of fact of preparation

A person may not procure or cause to be prepared an investigative consumer report on any consumer unless--

(1) it is clearly and accurately disclosed to the consumer that an investigative consumer report including information as to his character, general reputation, personal characteristics, and mode of living, whichever are applicable, may be made, and such disclosure (A) is made in a writing mailed, or otherwise delivered, to the consumer, not later than three days after the date on which the report was first requested, and (B) includes a statement informing the consumer of his right to request the additional disclosures provided for under subsection (b) of this section and the written summary of the rights of the consumer prepared pursuant to section 1681g(c) of this title; and

(2) the person certifies or has certified to the consumer reporting agency that –

(A) the person has made the disclosures to the consumer required by paragraph (1); and

(B) the person will comply with subsection (b) of this section.

(b) Disclosure on request of nature and scope of investigation

Any person who procures or causes to be prepared an investigative consumer report on any consumer shall, upon written request made by the consumer within a reasonable period of time after the receipt by him of the disclosure required by subsection (a)(1) of this section, make a complete and accurate disclosure of the nature and scope of the investigation requested. This disclosure shall be made in a writing mailed, or otherwise delivered, to the consumer not later than five days after the date on which the request for such disclosure was received from the consumer or such report was first requested, whichever is the later.

(c) Limitation on liability upon showing of reasonable procedures for compliance with provisions

No person may be held liable for any violation of subsection (a) or (b) of this section if he shows by a preponderance of the evidence that at the time of the violation he maintained reasonable procedures to assure compliance with subsection (a) or (b) of this section.

(d) Prohibitions

(1) Certification. A consumer reporting agency shall not prepare or furnish an investigative consumer report unless the agency has received a certification under subsection (a)(2) of this section from the person who requested the report.

(2) Inquiries. A consumer reporting agency shall not make an inquiry for the purpose of preparing an investigative consumer report on a consumer for employment purposes if the making of the inquiry by an employer or prospective employer of the consumer would violate any

applicable Federal or State equal employment opportunity law or regulation.

(3) Certain public record information. Except as otherwise provided in section 1681k of this title, a consumer reporting agency shall not furnish an investigative consumer report that includes information that is a matter of public record and that relates to an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment, unless the agency has verified the accuracy of the information during the 30-day period ending on the date on which the report is furnished.

(4) Certain adverse information. A consumer reporting agency shall not prepare or furnish an investigative consumer report on a consumer that contains information that is adverse to the interest of the consumer and that is obtained through a personal interview with a neighbor, friend, or associate of the consumer or with another person with whom the consumer is acquainted or who has knowledge of such item of information, unless –

(A) the agency has followed reasonable procedures to obtain confirmation of the information, from an additional source that has independent and direct knowledge of the information; or

(B) the person interviewed is the best possible source of the information.

§ 1681e. Compliance procedures

(a) Identity and purposes of credit users

Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

(b) Accuracy of report

Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

(c) Disclosure of consumer reports by users allowed.

A consumer reporting agency may not prohibit a user of a consumer report furnished by the agency on a consumer from disclosing the contents of the report to the consumer, if adverse action against the consumer has been taken by the user based in whole or in part on the report.

(d) Notice to users and furnishers of information.

(1) Notice requirement. A consumer reporting agency shall provide to any person –

(A) who regularly and in the ordinary course of business furnishes information to the agency with respect to any consumer; or

(B) to whom a consumer report is provided by the agency; a notice of such person's responsibilities under this subchapter.

(2) Content of notice. The Federal Trade Commission shall prescribe the content of notices under paragraph (1), and a consumer reporting agency shall be in

compliance with this subsection if it provides a notice under paragraph (1) that is substantially similar to the Federal Trade Commission prescription under this paragraph.

(e) Procurement of consumer report for resale

(1) Disclosure. A person may not procure a consumer report for purposes of reselling the report (or any information in the report) unless the person discloses to the consumer reporting agency that originally furnishes the report –

(A) the identity of the end-user of the report (or information); and

(B) each permissible purpose under section 1681b of this title for which the report is furnished to the end-user of the report (or information).

(2) Responsibilities of procurers for resale. A person who procures a consumer report for purposes of reselling the report (or any information in the report) shall –

(A) establish and comply with reasonable procedures designed to ensure that the report (or information) is resold by the person only for a purpose for which the report may be furnished under section 1681b of this title, including by requiring that each person to which the report (or information) is resold and that resells or provides the report (or information) to any other person –

(i) identifies each end user of the resold report (or information);

(ii) certifies each purpose for which the report (or information) will be used; and

(iii) certifies that the report (or information) will be used for no other purpose; and

(B) before reselling the report, make reasonable efforts to verify the identifications and certifications made under subparagraph (A).

(3) Resale of consumer report to a federal agency or department. Notwithstanding paragraph (1) or (2), a person who procures a consumer report for purposes of reselling the report (or any information in the report) shall not disclose the identity of the end-user of the report under paragraph (1) or (2) if –

(A) the end user is an agency or department of the United States Government which procures the report from the person for purposes of determining the eligibility of the consumer concerned to receive access or continued access to classified information (as defined in section 1681b(b)(4)(E)(i) of this title); and

(B) the agency or department certifies in writing to the person reselling the report that nondisclosure is necessary to protect classified information or the safety of persons employed by or contracting with, or undergoing investigation for work or contracting with the agency or department.

§ 1681f. Disclosures to governmental agencies

Notwithstanding the provisions of section 1681b of this title, a consumer reporting agency may furnish identifying information respecting any consumer, limited to his name, address, former addresses, places of employment, or former places of employment, to a governmental agency.

§ 1681h. Conditions and form of disclosure to consumers

(a) In general

(1) Proper identification. A consumer reporting agency shall require, as a condition of making the disclosures required under section 1681g of this title, that the consumer furnish proper identification.

(2) Disclosure in writing.--Except as provided in subsection (b) of this section, the disclosures required to be made under section 1681(g) of this title shall be provided under that section in writing.

(b) Other forms of disclosure

(1) In general. If authorized by a consumer, a consumer reporting agency may make the disclosures required under 1681g of this title –

(A) other than in writing; and

(B) in such form as may be –

(i) specified by the consumer in accordance with paragraph (2); and

(ii) available from the agency.

(2) Form. A consumer may specify pursuant to paragraph (1) that disclosures under section 1681g of this title shall be made –

(A) in person, upon the appearance of the consumer at the place of business of the consumer reporting agency where disclosures are regularly provided, during normal business hours, and on reasonable notice;

(B) by telephone, if the consumer has made a written request for disclosure by telephone;

(C) by electronic means, if available from the agency; or

(D) by any other reasonable means that is available from the agency.

(c) Trained personnel

Any consumer reporting agency shall provide trained personnel to explain to the consumer any information furnished to him pursuant to section 1681g of this title.

(d) Persons accompanying consumer

The consumer shall be permitted to be accompanied by one other person of his choosing, who shall furnish reasonable identification. A consumer reporting agency may require the consumer to furnish a written statement granting permission to the consumer reporting agency to discuss the consumer's file in such person's presence.

(e) Limitation of liability

Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report except as to false information furnished with malice or willful intent to injure such consumer.

§ 1681g. Disclosures to consumers

(a) Information on file; sources; report recipients

Every consumer reporting agency shall, upon request, and subject to section 1681h(a)(1) of this title, clearly and accurately disclose to the consumer:

(1) All information in the consumer's file at the time of the request, except that nothing in this paragraph shall be construed to require a consumer reporting agency to disclose to a consumer any information concerning credit scores or any other risk scores or predictors relating to the consumer.

(2) The sources of the information; except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed: Provided, That in the event an action is brought under this subchapter, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

(3) (A) Identification of each person (including each end-user identified under section 1681e(e)(1) of this title) that procured a consumer report –

(i) for employment purposes, during the 2-year period preceding the date on which the request is made; or

(ii) for any other purpose, during the 1-year period preceding the date on which the request is made.

(B) An identification of a person under subparagraph (A) shall include –

(i) the name of the person or, if applicable, the trade name (written in full) under which such person conducts business; and

(ii) upon request of the consumer, the address and telephone number of the person.

(C) Subparagraph (A) does not apply if--

(i) the end user is an agency or department of the United States Government that procures the report from the person for purposes of determining the eligibility of the consumer to whom the report relates to receive access or continued access to classified information (as defined in section 1681b(b)(4)(E)(i) of this title); and

(ii) the head of the agency or department makes a written finding as prescribed under section 1681b(b)(4)(A) of this title.

(4) The dates, original payees, and amounts of any checks upon which is based any adverse characterization of the consumer, included in the file at the time of the disclosure.

(5) A record of all inquiries received by the agency during the 1-year period preceding the request that identified the consumer in connection with a credit or insurance transaction that was not initiated by the consumer.

(b) Exempt information

The requirements of subsection (a) of this section respecting the disclosure of sources of information and the recipients of consumer reports do not apply to information received or consumer reports furnished prior to the effective date of this subchapter except to the extent that the matter involved is contained in the files of the consumer reporting agency on that date.

(c) Summary of rights required to be included with disclosure

(1) Summary of rights. A consumer reporting agency shall provide to a consumer, with each written disclosure by the agency to the consumer under this section--

(A) a written summary of all of the rights that the consumer has under this subchapter; and

(B) in the case of a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis, a toll-free telephone number established by the agency, at which personnel are accessible to consumers during normal business hours.

(2) Specific items required to be included. The summary of rights required under paragraph (1) shall include –

(A) a brief description of this subchapter and all rights of consumers under this subchapter;

(B) an explanation of how the consumer may exercise the rights of the consumer under this subchapter;

(C) list of all Federal agencies responsible for enforcing any provision of this subchapter and the address and any appropriate phone number of each such agency, in a form that will assist the consumer in selecting the appropriate agency;

(D) a statement that the consumer may have additional rights under State law and that the consumer may wish to contact a State or local consumer protection agency or a State attorney general to learn of those rights; and

(E) a statement that a consumer reporting agency is not required to remove accurate derogatory information from a consumer's file, unless the information is outdated under section 1681c of this title or cannot be verified.

(3) Form of summary of rights. For purposes of this subsection and any disclosure by a consumer reporting agency required under this subchapter with respect to consumers' rights, the Federal Trade Commission (after consultation with each Federal agency referred to in section 1681s(b) of this title) shall prescribe the form and content of any such disclosure of the rights of consumers required under this subchapter. A consumer reporting agency shall be in compliance with this subsection if it provides disclosures under paragraph (1) that are substantially similar to the Federal Trade Commission prescription under this paragraph.

(4) Effectiveness. No disclosures shall be required under this subsection until the date on which the Federal Trade

Commission prescribes the form and content of such disclosures under paragraph (3).

§ 1681i. Procedure in case of disputed accuracy

(a) Reinvestigations of disputed information

(1) Reinvestigation required.

(A) In general. If the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly of such dispute, the agency shall reinvestigate free of charge and record the current status of the disputed information, or delete the item from the file in accordance with paragraph (5), before the end of the 30-day period beginning on the date on which the agency receives the notice of the dispute from the consumer.

(B) Extension of period to reinvestigate. Except as provided in subparagraph (C), the 30-day period described in subparagraph (A) may be extended for not more than 15 additional days if the consumer reporting agency receives information from the consumer during that 30-day period that is relevant to the reinvestigation.

(C) Limitations on extension of period to reinvestigate.--Subparagraph (B) shall not apply to any reinvestigation in which, during the 30-day period described in subparagraph (A), the information that is the subject of the reinvestigation is found to be inaccurate or incomplete or the consumer reporting agency determines that the information cannot be verified.

(2) Prompt notice of dispute to furnisher of information.

(A) In general. Before the expiration of the 5-business-day period beginning on the date on which a consumer reporting agency receives notice of a dispute from any consumer in accordance with paragraph (1), the agency shall provide notification of the dispute to any person who provided any item of information in dispute, at the address and in the manner established with the person. The notice shall include all relevant information regarding the dispute that the agency has received from the consumer.

(B) Provision of other information from consumer. The consumer reporting agency shall promptly provide to the person who provided the information in dispute all relevant information regarding the dispute that is received by the agency from the consumer after the period referred to in subparagraph (A) and before the end of the period referred to in paragraph (1)(A).

(3) Determination that dispute is frivolous or irrelevant.

(A) In general. Notwithstanding paragraph (1), a consumer reporting agency may terminate a reinvestigation of information disputed by a consumer under that paragraph if the agency reasonably determines that the dispute by the consumer is frivolous or irrelevant, including by reason of a failure by a consumer to provide sufficient information to investigate the disputed information.

(B) Notice of determination. Upon making any determination in accordance with subparagraph (A) that a dispute is frivolous or irrelevant, a consumer reporting agency shall notify the consumer of such determination not later than 5 business days after making such determination, by mail or, if authorized by the consumer for that purpose, by any other means available to the agency.

(C) Contents of notice. A notice under subparagraph (B) shall include –

(i) the reasons for the determination under subparagraph (A); and

(ii) identification of any information required to investigate the disputed information, which may consist of a standardized form describing the general nature of such information.

(4) Consideration of consumer information. In conducting any reinvestigation under paragraph (1) with respect to disputed information in the file of any consumer, the consumer reporting agency shall review and consider all relevant information submitted by the consumer in the period described in paragraph (1)(A) with respect to such disputed information.

(5) Treatment of inaccurate or unverifiable information.

(A) In general. If, after any reinvestigation under paragraph (1) of any information disputed by a consumer, an item of the information is found to be inaccurate or incomplete or cannot be verified, the consumer reporting agency shall promptly delete that item of information from the consumer's file or modify that item of information, as appropriate, based on the results of the reinvestigation.

(B) Requirements relating to reinsertion of previously deleted material.

(i) Certification of accuracy of information. If any information is deleted from a consumer's file pursuant to subparagraph (A), the information may not be reinserted in the file by the consumer reporting agency unless the person who furnishes the information certifies that the information is complete and accurate.

(ii) Notice to consumer. If any information that has been deleted from a consumer's file pursuant to subparagraph (A) is reinserted in the file, the consumer reporting agency shall notify the consumer of the reinsertion in writing not later than 5 business days after the reinsertion or, if authorized by the consumer for that purpose, by any other means available to the agency.

(iii) Additional information. As part of, or in addition to, the notice under clause (ii), a consumer reporting agency shall provide to a consumer in writing not later than 5 business days after the date of the reinsertion –

(I) a statement that the disputed information has been reinserted;

(II) the business name and address of any furnisher of information contacted and the telephone number of such furnisher, if reasonably available, or of any furnisher of information that contacted the consumer reporting agency, in connection with the reinsertion of such information; and

(III) a notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the disputed information.

(C) Procedures to prevent reappearance. A consumer reporting agency shall maintain reasonable procedures designed to prevent the reappearance in a consumer's file, and in consumer reports on the consumer, of information that is deleted pursuant to this paragraph (other than information that is reinserted in accordance with subparagraph (B)(i)).

(D) Automated reinvestigation system. Any consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall implement an automated system through which furnishers of information to that consumer reporting agency may report the results of a reinvestigation that finds incomplete or inaccurate information in a consumer's file to other such consumer reporting agencies.

(6) Notice of results of reinvestigation.

(A) In general. A consumer reporting agency shall provide written notice to a consumer of the results of a reinvestigation under this subsection not later than 5 business days after the completion of the reinvestigation, by mail or, if authorized by the consumer for that purpose, by other means available to the agency.

(B) Contents. As part of, or in addition to, the notice under subparagraph (A), a consumer reporting agency shall provide to a consumer in writing before the expiration of the 5-day period referred to in subparagraph (A) –

(i) a statement that the reinvestigation is completed;

(ii) a consumer report that is based upon the consumer's file as that file is revised as a result of the reinvestigation;

(iii) a notice that, if requested by the consumer, a description of the procedure used to determine the accuracy and completeness of the information shall be provided to the consumer by the agency, including the business name and address of any furnisher of information contacted in connection with such information and the telephone number of such furnisher, if reasonably available;

(iv) a notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the information; and

(v) a notice that the consumer has the right to request under subsection (d) of this section that the consumer reporting agency furnish notifications under that subsection.

(7) Description of reinvestigation procedure.--A consumer reporting agency shall provide to a consumer a description referred to in paragraph (6)(B)(iii) by not later than 15 days after receiving a request from the consumer for that description.

(8) Expedited dispute resolution.--If a dispute regarding an item of information in a consumer's file at a consumer reporting agency is resolved in accordance with paragraph (5)(A) by the deletion of the disputed information by not later than 3 business days after the date on which the agency receives notice of the dispute from the consumer in accordance with paragraph (1)(A), then the agency shall not be required to comply with paragraphs (2), (6), and (7) with respect to that dispute if the agency –

(A) provides prompt notice of the deletion to the consumer by telephone;

(B) includes in that notice, or in a written notice that accompanies a confirmation and consumer report provided in accordance with subparagraph (C), a statement of the consumer's right to request under subsection (d) of this section that the agency furnish notifications under that subsection; and

(C) provides written confirmation of the deletion and a copy of a consumer report on the consumer that is based on the consumer's file after the deletion, not later than 5 business days after making the deletion.

(b) Statement of dispute If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute.

(c) Notification of consumer dispute in subsequent consumer reports

Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.

(d) Notification of deletion of disputed information

Following any deletion of information which is found to be inaccurate or whose accuracy can no longer be verified or any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) of this section to any person specifically designated by the consumer who has within two years prior thereto received a consumer report for employment purposes, or within six months prior thereto received a consumer report for any other purpose, which contained the deleted or disputed information.

§ 1681k. Public record information for employment purposes

- (a) In general

A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall –

(1) at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or

(2) maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. For purposes of this paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up to date if the current public record status of the item at the time of the report is reported.

(b) exemption for National security investigations

Subsection (a) does not apply in the case of an agency or department of the United States Government that seeks to obtain and use a consumer report for employment purposes, if the head of the agency or department makes a written finding as prescribed under section 1681b(b)(4)(A) of this title.

§ 1681m. Requirements on users of consumer reports

(a) Duties of users taking adverse actions on the basis of information contained in consumer reports

If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall –

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically –

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right –

(A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

(b) Adverse action based on information obtained from third parties other than consumer reporting agencies

(1) In general. Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness [FN1], credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

(2) Duties of person taking certain actions based on information provided by affiliate.

(A) Duties, generally. If a person takes an action described in subparagraph (B) with respect to a consumer, based in whole or in part on information described in subparagraph (C), the person shall –

(i) notify the consumer of the action, including a statement that the consumer may obtain the information in accordance with clause (ii); and

(ii) upon a written request from the consumer received within 60 days after transmittal of the notice required by clause (i), disclose to the consumer the nature of the information upon which the action is based by not later than 30 days after receipt of the request.

(B) Action described. An action referred to in subparagraph (A) is an adverse action described in section 1681a(k)(1)(A) of this title, taken in connection with a transaction initiated by the consumer, or any adverse action described in clause (i) or (ii) of section 1681a(k)(1)(B) of this title.

(C) Information described. Information referred to in subparagraph (A) –

(i) except as provided in clause (ii), is information that –

(I) is furnished to the person taking the action by a person related by common ownership or affiliated by common corporate control to the person taking the action; and

(II) bears on the credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living of the consumer; and

(ii) does not include –

(I) information solely as to transactions or experiences between the consumer and the person furnishing the information; or

(II) information in a consumer report.

(c) Reasonable procedures to assure compliance

No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section.

(d) Duties of users making written credit or insurance solicitations on the basis of information contained in consumer files

(1) In general. Any person who uses a consumer report on any consumer in connection with any credit or insurance transaction that is not initiated by the consumer, that is provided to that person under section 1681b(c)(1)(B) of this title, shall provide with each written solicitation made to the consumer regarding the transaction a clear and conspicuous statement that –

(A) information contained in the consumer's consumer report was used in connection with the transaction;

(B) the consumer received the offer of credit or insurance because the consumer satisfied the criteria for credit worthiness or insurability under which the consumer was selected for the offer;

(C) if applicable, the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on credit worthiness or insurability or does not furnish any required collateral;

(D) the consumer has a right to prohibit information contained in the consumer's file with any consumer reporting agency from being used in connection with any credit or insurance transaction that is not initiated by the consumer; and

(E) the consumer may exercise the right referred to in subparagraph (D) by notifying a notification system established under section 1681b(e) of this title.

(2) Disclosure of address and telephone number. A statement under paragraph (1) shall include the address and toll-free telephone number of the appropriate notification system established under section 1681b(e) of this title.

(3) Maintaining criteria on file. A person who makes an offer of credit or insurance to a consumer under a credit or insurance transaction described in paragraph (1) shall maintain on file the criteria used to select the consumer to receive the offer, all criteria bearing on credit worthiness or insurability, as applicable, that are the basis for determining whether or not to extend credit or insurance pursuant to the offer, and any requirement for the furnishing of collateral as a condition of the extension of credit or insurance, until the expiration of the 3-year period beginning on the date on which the offer is made to the consumer.

(4) Authority of Federal agencies regarding unfair or deceptive acts or practices not affected. This section is not intended to affect the authority of any Federal or State agency to enforce a prohibition against unfair or deceptive acts or practices, including the making of false or misleading statements in connection with a credit or insurance transaction that is not initiated by the consumer.

§ 1681n. Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of –

(1) (A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

§ 1681p. Jurisdiction of courts; limitation of actions

An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises, except that where a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this subchapter, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

§ 1681q. Obtaining information under false pretenses

Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under Title 18, imprisoned for not more than 2 years, or both.

§ 1681r. Unauthorized disclosures by officers or employees

Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information shall be fined under Title 18, imprisoned for not more than 2 years, or both.

§ 1681s. Administrative enforcement

(a) Federal Trade Commission; powers

(1) Enforcement by Federal Trade Commission. Compliance with the requirements imposed under this subchapter shall be enforced under the Federal Trade Commission Act [15 U.S.C.A. § 41 et seq.] by the Federal Trade Commission with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this

subchapter is specifically committed to some other government agency under subsection (b) hereof. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this subchapter shall constitute an unfair or deceptive act or practice in commerce in violation of section 45(a) of this title and shall be subject to enforcement by the Federal Trade Commission under section 45(b) of this title with respect to any consumer reporting agency or person subject to enforcement by the Federal Trade Commission pursuant to this subsection, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act. The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this subchapter and to require the filing of reports, the production of documents, and the appearance of witnesses as though the applicable terms and conditions of the Federal Trade Commission Act were part of this subchapter. Any person violating any of the provisions of this subchapter shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions thereof were part of this subchapter.

(2) (A) In the event of a knowing violation, which constitutes a pattern or practice of violations of this subchapter, the Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person that violates this subchapter. In such action, such person shall be liable for a civil penalty of not more than $2,500 per violation.

(B) In determining the amount of a civil penalty under subparagraph (A), the court shall take into

account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(3) Notwithstanding paragraph (2), a court may not impose any civil penalty on a person for a violation of section 1681s-2(a)(1) of this title unless the person has been enjoined from committing the violation, or ordered not to commit the violation, in an action or proceeding brought by or on behalf of the Federal Trade Commission, and has violated the injunction or order, and the court may not impose any civil penalty for any violation occurring before the date of the violation of the injunction or order.

(4) Repealed. Pub.L. 106-102, Title V, § 506(b), Nov. 12, 1999, 113 Stat. 1442

(b) Enforcement by other agencies

Compliance with the requirements imposed under this subchapter with respect to consumer reporting agencies, persons who use consumer reports from such agencies, persons who furnish information to such agencies, and users of information that are subject to subsection (d) of section 1681m of this title shall be enforced under –

(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C.A. § 1818], in the case of –

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25(a) of the

Federal Reserve Act [12 U.S.C.A. §§ 601 et seq., 611 et seq.], by the Board of Governors of the Federal Reserve System; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;

(2) section 8 of the Federal Deposit Insurance Act [12 U.S.C.A. § 1818], by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation.

(3) the Federal Credit Union Act [12 U.S.C.A. § 1751 et seq.], by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

(4) subtitle IV of Title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(5) part A of subtitle VII of Title 49, by the Secretary of Transportation with respect to any air carrier or foreign air carrier subject to that part; and

(6) the Packers and Stockyards Act, 1921 [7 U.S.C.A. § 181 et seq.] (except as provided in section 406 of that Act [7 U.S.C.A. §§ 226, 227]), by the Secretary of Agriculture with respect to any activities subject to that Act.

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) State action for violations

(1) Authority of States. In addition to such other remedies as are provided under State law, if the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this subchapter, the State –

(A) may bring an action to enjoin such violation in any appropriate United States district court or in any other court of competent jurisdiction;

(B) subject to paragraph (5), may bring an action on behalf of the residents of the State to recover--

(i) damages for which the person is liable to such residents under sections 1681n and 1681o of this title as a result of the violation;

(ii) in the case of a violation of section 1681s-2(a) of this title, damages for which the person would, but for section 1681s-2(c) of this title, be liable to such residents as a result of the violation; or

(iii) damages of not more than $1,000 for each willful or negligent violation; and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorney fees as determined by the court.

(2) Rights of Federal regulators. The State shall serve prior written notice of any action under paragraph (1) upon the Federal Trade Commission or the appropriate Federal regulator determined under subsection (b) of this section and provide the Commission or appropriate Federal regulator with a copy of its complaint, except in any case in which such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Federal Trade Commission or appropriate Federal regulator shall have the right –

(A) to intervene in the action;

(B) upon so intervening, to be heard on all matters arising therein;

(C) to remove the action to the appropriate United States district court; and

(D) to file petitions for appeal.

(3) Investigatory powers. For purposes of bringing any action under this subsection, nothing in this subsection shall prevent the chief law enforcement officer, or an official or agency designated by a State, from exercising the powers conferred on the chief law enforcement officer or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(4) Limitation on State action while Federal action pending. If the Federal Trade Commission or the appropriate Federal regulator has instituted a civil action or an administrative action under section 1818 of Title 12 for a violation of this subchapter, no State may, during the pendency of such action, bring an action under this section against any defendant named in the complaint of the Commission or the appropriate Federal regulator for any violation of this subchapter that is alleged in that complaint.

(5) Limitations on State actions for violation of section 1681s-2(a)(1) of this title.

(A) Violation of injunction required. A State may not bring an action against a person under paragraph (1)(B) for a violation of section 1681s- 2(a)(1) of this title, unless –

(i) the person has been enjoined from committing the violation, in an action brought by the State under paragraph (1)(A); and

(ii) the person has violated the injunction.

(B) Limitation on damages recoverable. In an action against a person under paragraph (1)(B) for a violation of section 1681s-2(a)(1) of this title, a State may not recover any damages incurred before the date of the violation of an injunction on which the action is based.

(d) Enforcement under other authority

For the purpose of the exercise by any agency referred to in subsection (b) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b) of this section, each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law.

(e) Regulatory authority

(1) The Federal banking agencies referred to in paragraphs (1) and (2) of subsection (b) shall jointly prescribe such regulations as necessary to carry out the purposes of this subchapter with respect to any persons identified under paragraphs (1) and (2) of subsection (b), and the Board of Governors of the Federal Reserve System shall have authority to prescribe regulations consistent with such joint regulations with respect to bank holding companies and affiliates (other than depository institutions and consumer reporting agencies) of such holding companies.

(2) The Board of the National Credit Union Administration shall prescribe such regulations as necessary to

carry out the purposes of this subchapter with respect to any persons identified under paragraph (3) of subsection (b).

§ 1681t. Relation to State laws

(a) In general

Except as provided in subsections (b) and (c) of this section, this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

(b) General exceptions

No requirement or prohibition may be imposed under the laws of any State –

(1) with respect to any subject matter regulated under –

(A) subsection (c) or (e) of section 1681b of this title, relating to the prescreening of consumer reports;

(B) section 1681i of this title, relating to the time by which a consumer reporting agency must take any action, including the provision of notification to a consumer or other person, in any procedure related to the disputed accuracy of information in a consumer's file, except that this subparagraph shall not apply to any State law in effect on September 30, 1996;

(C) subsections (a) and (b) of section 1681m of this title, relating to the duties of a person who takes any adverse action with respect to a consumer;

(D) section 1681m(d) of this title, relating to the duties of persons who use a consumer report of a consumer in connection with any credit or insurance transaction that is not initiated by the consumer and that consists of a firm offer of credit or insurance;

(E) section 1681c of this title, relating to information contained in consumer reports, except that this subparagraph shall not apply to any State law in effect on September 30, 1996; or

(F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply –

(i) with respect to section 54A(a) of chapter 93 of the Massachusetts Annotated Laws (as in effect on September 30, 1996); or

(ii) with respect to section 1785.25(a) of the California Civil Code (as in effect on September 30, 1996);

(2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control, except that this paragraph shall not apply with respect to subsection (a) or (c)(1) of section 2480e of title 9, Vermont Statutes Annotated (as in effect on September 30, 1996); or

(3) with respect to the form and content of any disclosure required to be made under section 1681g(c) of this title.

(c) Definition of firm offer of credit or insurance

Notwithstanding any definition of the term "firm offer of credit or insurance" (or any equivalent term) under the laws of any State, the definition of that term contained in section 1681a(l) of this title shall be construed to apply in the enforcement and interpretation of the laws of any State governing consumer reports.

(d) Limitations

Subsections (b) and (c) of this section –

(1) do not affect any settlement, agreement, or consent judgment between any State Attorney General and any consumer reporting agency in effect on September 30, 1996; and

(2) do not apply to any provision of State law (including any provision of a State constitution) that –

(A) is enacted after January 1, 2004;

(B) states explicitly that the provision is intended to supplement this subchapter; and

(C) gives greater protection to consumers than is provided under this subchapter.

Apr 19, 2001

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Supreme Court, U.S.
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No. 00-1045

IN THE

Supreme Court of the United States

TRW INC.,

Petitioner,

v.

ADELAIDE ANDREWS,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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QUESTION PRESENTED

Whether Section 618 of the Fair Credit Reporting Act, 15 U.S.C. § 1681p, contains an implicit exception incorporating the discovery rule that permits a suit for violation of the Act to be brought within two years of the date of the discovery of injury even in the absence of any willful misrepresentation.

PARTIES TO THE PROCEEDING

The only parties before the United States Court of Appeals for the Ninth Circuit were petitioner TRW Inc. and respondent Adelaide Andrews. TRW is publicly owned and has no parent corporations. The subsidiaries and affiliates of TRW that are not wholly owned by it are listed in the petition for a writ of certiorari. Before the United States District Court for the Central District of California, Trans Union LLC was also a party to this case.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT 2

SUMMARY OF ARGUMENT 9

ARGUMENT 12

I. THE STATUTE OF LIMITATIONS IN THE FAIR CREDIT REPORTING ACT DOES NOT INCORPORATE A GENERAL DISCOVERY RULE 14

  A. The Statute of Limitations in Section 618 Generally Begins to Run When Liability Arises, Not Upon Discovery of Injury or Other Facts 14

  B. The Limited Discovery Provision in Section 618's Misrepresentation Exception Precludes Implication of a More General Discovery Rule 20

1. Section 618's Express Exception for Certain Misrepresentations Precludes Implication of Additional Unstated Exceptions 21

2. A General Discovery Rule Would Render the Limited Discovery Provision in the Misrepresentation Exception Superfluous 23

II. THE GENERAL DISCOVERY RULE CONFLICTS WITH THE STRUCTURE OF THE FAIR CREDIT REPORTING ACT 25

A. The Notification and Access Provisions of the FCRA Ensure Prompt Discovery of Violations of the Act 26

B. A General Discovery Rule Would Upset the Balance Struck by Congress in the Act 29

C. Even Without a General Discovery Rule, Section 618 Improves the Ability of Consumers to Bring Credit Reporting Claims 32

III. THE GENERAL DISCOVERY RULE ALSO CONFLICTS WITH THE HISTORY OF THE FAIR CREDIT REPORTING ACT 35

A. Congress Rejected a Proposal to Incorporate the General Discovery Rule into the Act 35

B. The Amendment of Section 618 Does Not Support Respondent's Interpretation 37

C. Congress Ratified the Case Law Rejecting a General Discovery Rule When It Revised the Act in 1996 39

IV. THE PRESUMPTION APPLIED BY THE NINTH CIRCUIT DOES NOT SAVE THE DECISION BELOW 40

CONCLUSION 46

TABLE OF AUTHORITIES

Page

Cases

Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987) 41, 43
Allen v. Equifax Credit Info. Servs., Inc., No. 94-35074, 1995 WL 21422 (9th Cir. Jan. 11, 1995) 8, 12
American Bank & Trust Co. v. Dallas Cty, 463 U.S. 855 (1983) 22
Andrus v. Glover Constr. Co., 446 U.S. 608 (1980) 10, 21
Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991) 43
Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 45
Atwell v. Retail Credit Co., 431 F.2d 1008 (4th Cir. 1970) 15
Barron v. Trans Union Corp., 82 F. Supp. 2d 1288 (M.D. Ala. 2000) 12
Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp., 522 U.S. 192 (1997) . . 10, 17, 41
Ben-Hur v. Equifax Info. Serv., Inc., 976 F. Supp. 795 (E.D. Wis. 1997) 12
Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888 (1988) 29
Bennett v. New York Cent. R.R., 380 U.S. 424 (1965) 44
Cada v. Baxter Healthcare Corp., 920 F.2d 446 (7th Cir. 1990) 35
Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) 40
Catrone v. Thoroughbred Racing Ass'n. of N. Am., Inc., 929 F.2d 881 (1st Cir. 1991) 33

Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945) 29
Christensen v. Harris Cty., 529 U.S. 576 (2000) 13
Clark v. Iowa City, 87 U.S. (20 Wall.) 583 (1874) . . . 9, 14
Clark v. State Farm Fire & Cas. Ins. Co., 54 F.3d 669 (10th Cir. 1995) 12
Clay v. Equifax, Inc., 762 F.2d 952 (11th Cir. 1985) . . . 12
Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 19
Crown Coat Front Co. v. United States, 386 U.S. 503 (1967) 20
Cushman v. Trans Union Corp., 115 F.3d 220 (3d Cir. 1997) 33
Dornhecker v. Ameritech Corp., 99 F. Supp. 2d 918 (N.D. Ill. 2000) 12
EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) 43
Edgar v. Reich, 881 F. Supp. 83 (D. Mass. 1995) 12
Food & Drug Adm'n v. Brown & Williams Tobacco Corp., 529 U.S. 120 (2000) 25
Gates Rubber Co. v. USM Corp., 508 F.2d 603 (7th Cir. 1975) 39
Gill v. Kostroff, No. 98-930-CIV-T-17A, 2000 WL 141258 (M.D. Fla. Feb. 8, 2000) 12
Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322 (1978) 39
Hallstrom v. Tillamook Cty., 493 U.S. 20 (1989) 14
Holmberg v. Armbrecht, 327 U.S. 392 (1946) 43, 44
Honda v. Clark, 386 U.S. 484 (1967) 44
Houghton v. Ins. Crime Prevention Inst., 795 F.2d 322 (3d Cir. 1986) 12
Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 14
Hyde v. Hibernia Nat'l Bank, 861 F.2d 446 (5th Cir. 1988) 12

Irwin v. Dep't of Veteran Affairs, 498 U.S. 89 (1990) . . . 22, 44

Isbrandtsen Co. v. Johnson, 343 U.S. 779 (1952) . . . 15, 41

Johnson v. Ry. Express Agency, 421 U.S. 261 (1985) . . . 30

Jones v. One Valley Bank, No. 92-2583, 1993 WL 264571 (4th Cir. July 14, 1993) . . . 12

Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) . . . *passim*

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991) . . . 43, 44

Lazar v. Trans Union LLC, 195 F.R.D. 665 (C.D. Cal. 2000) . . . 12

Lindahl v. OPM, 470 U.S. 768 (1985) . . . 40

Matise v. Tran Union Corp., No. A 3:96-CV3353-D, 1998 WL 872511 (N.D. Tex. Nov. 30, 1998) . . . 12

McAnly v. Middleton & Reutlinger, P.S.C., 77 F. Supp. 2d 810 (W.D. Ky. 1999) . . . 12

McMahon v. United States, 342 U.S. 25 (1951) . . . 10, 16

McNamara v. Guazzoni, No. 98 CIV 4085(HB), 1999 WL 322648 (S.D.N.Y. May 20, 1999) . . . 12

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STATUTES

5 U.S.C. § 6304(e) . . . 17
5 U.S.C. § 8477(e)(6)(B) . . . 18
7 U.S.C. § 2566(a) . . . 18
10 U.S.C. § 1552(b) . . . 17
12 U.S.C. § 77www(a) . . . 17
12 U.S.C. § 78i . . . 17
12 U.S.C. § 78r(c) . . . 17
12 U.S.C. § 78cc(b) . . . 17
12 U.S.C. § 1711(a)(2) . . . 17
12 U.S.C. § 1715z-4a(d) . . . 17
12 U.S.C. § 2710(c)(3) . . . 17
12 U.S.C. § 3006(c) . . . 17
12 U.S.C. § 3416 . . . 17
12 U.S.C. § 6104(a) . . . 17
15 U.S.C. § 15b . . . 42
15 U.S.C. § 77m . . . 17
Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681u
  15 U.S.C. § 1681 . . . *passim*
  15 U.S.C. § 1681a . . . *passim*
  15 U.S.C. § 1681b . . . 3, 4, 10, 26
  15 U.S.C. § 1681c . . . 3
  15 U.S.C. § 1681d . . . *passim*
  15 U.S.C. § 1681e . . . 3
  15 U.S.C. § 1681g . . . *passim*
  15 U.S.C. § 1681i . . . 4
  15 U.S.C. § 1681j . . . 27
  15 U.S.C. § 1681m . . . 4, 26
  15 U.S.C. § 1681n . . . 5, 16
  15 U.S.C. § 1681o . . . 4, 16

  15 U.S.C. § 1681p . . . *passim*
  15 U.S.C. § 1681q . . . 4
  15 U.S.C. § 1681r . . . 4
  15 U.S.C. § 1681t . . . 33
Racketeer Influenced and Corrupt Organizations Act,
  18 U.S.C. §§ 1961-1968 . . . 40
18 U.S.C. § 2520(e) . . . 18
18 U.S.C. § 2710(c)(3) . . . 18
19 U.S.C. § 1621 . . . 18
26 U.S.C. § 7431(d) . . . 18
28 U.S.C. § 1254(1) . . . 1
28 U.S.C. § 2401(b) . . . 19
28 U.S.C. § 2409a . . . 14, 18, 22
28 U.S.C. § 2416 . . . 18
29 U.S.C. § 1113 . . . 18
29 U.S.C. § 1451(f) . . . 20
29 U.S.C. § 1303 . . . 20
29 U.S.C. § 1370(f) . . . 20
29 U.S.C. § 1451(f) . . . 17, 16, 20
31 U.S.C. § 3731(b) . . . 18
42 U.S.C. § 9612(d)(2) . . . 18
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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, as amended (Pet. App. 1a), is reported at 225 F.3d 1063. The opinion of the district court (Pet. App. 10a) is reported at 7 F. Supp. 2d 1056.

JURISDICTION

The Ninth Circuit issued its opinion and entered judgment in this case on July 17, 2000. After denying each party's petition for rehearing or rehearing en banc, the Ninth Circuit amended its opinion on October 4, 2000. The petition for a writ of certiorari was filed on December 22, 2000 and granted on March 5, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 618 of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, provides in full:

> An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises, except that where a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this subchapter, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

15 U.S.C. § 1681p. Other portions of the Act, as amended, are reprinted at J.A. 32-88.[1]

STATEMENT

This case concerns the statute of limitations governing the private rights of actions created by the Fair Credit Reporting Act (the "FCRA" or the "Act"), as amended, 15 U.S.C. § 1681 *et seq.* Section 618 of the Act requires that such actions normally be brought "within two years from the date on which liability arises." *Id.* § 1681p. That section also contains an express exception for willful misrepresentations of information required by the Act to be disclosed. Under that exception, when such misrepresentations material to a claim under the Act are made, that claim may be brought "within two years after discovery by the individual of the misrepresentation." *Id.* The question presented here is whether a broader discovery rule, which would be applicable to all claims even in the absence of the willful misrepresentation expressly required by Congress, can also be implied into Section 618.

The Fair Credit Reporting Act—Petitioner TRW Inc. is the former owner of one of the three national credit bureaus, all of which maintain computer files on the credit history of most Americans. Pet. App. 13a-14a & n.3.[2] As Congress has recognized, *see* 15 U.S.C. § 1681(a)(3), credit bureaus and other consumer reporting agencies play a vital role in making credit available to American consumers, and in facilitating credit, insurance and employment decisions, by providing reports that help their users gauge the risk of extending credit, insurance, or employment to a consumer. *See, e.g.*, William P.

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[1] Because some of the documents material to the claims before this Court were filed under seal, the parties have lodged with the Court a supplemental sealed joint appendix, designated as "S.J.A." in addition to the regular joint appendix ("J.A.").

[2] On September 19, 1996, Experian Information Solutions, Inc. assumed control over petitioner's former credit reporting business. Petitioner no longer retains any interest in that business. SER 825.

Ogburn, *Fair Credit Reporting Act* § 1.2, at 27 (1998). In fact, approximately two million credit reports are purchased every work day. *See id.* Consumers can, however, be denied credit or other opportunities due to inaccurate reports, and they therefore have an interest in keeping the information in those reports private, especially if the reports go beyond the information concerning purchases and payments contained in ordinary credit reports to include information on their personal habits and characteristics. Accordingly, in 1970, Congress passed the Fair Credit Reporting Act, which was revised extensively in 1996, *see* Pub. L. No. 104-208, §§ 2401-22, 110 Stat. 3009-396 to 462 (1996), to regulate the credit reporting industry.

The FCRA strikes a balance between the interests of consumers in accuracy and privacy on the one hand and the needs of the credit reporting industry and the credit information users it serves on the other by requiring reporting agencies to "adopt reasonable procedures" to ensure accuracy, confidentiality, and proper utilization of the information they collect. 15 U.S.C. § 1681b. For example, the Act permits credit reporting agencies to furnish consumer reports only for "permissible purposes" specified in the Act. *Id.* § 1681b. The FCRA also requires such agencies to "follow reasonable procedures to assure maximum possible accuracy" of information in reports they provide, *id.* § 1681e(b), and it generally prohibits agencies from disclosing certain obsolete information, *see id.* § 1681c(a). In addition, the Act permits consumers to dispute the accuracy of information in their files,[3] and it requires agencies to reinvestigate challenged information, promptly inform consumers of the results of the reinvestigation, and provide notice of any reinsertion of such information. *See id.* §§ 1681i(a), (d); *see also id.* § 1681i(b) (permitting consumers to place statements disputing challenged information in their files).

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[3] The word "file" is a term of art under the FCRA covering "all of the information on [a] consumer recorded and retained by a computer reporting agency." 15 U.S.C. § 1681a(g). During the time period relevant here, petitioner did not maintain actual files on consumers; instead, it stored credit information organized by "trade lines," computerized information on individual credit accounts linked to consumer identification information. SER 841-42. For the sake of convenience, however, this brief uses the term file in its broad sense under

The FCRA also contains notice and access provisions that enable consumers to review the files maintained on them and entitles them to notice of disclosures of those files as well as any adverse actions taken as a result of those disclosures. For example, the Act requires that a consumer be notified whenever a report on that consumer is requested for employment purposes. *See* 15 U.S.C. § 1681b(b). Notification is also required when an "investigative consumer report" containing information about a consumer's reputation, character, and other highly personal matters is requested for any purpose. *See id.* § 1681(d)(1); *see also id.* § 1681a(e) (defining investigative report). Perhaps even more importantly, the Act requires notification when any "adverse action" is taken in whole or in part based upon information contained in a consumer report. *See id.* § 1681m(a); *see also id.* § 1681a(k) (defining "adverse action"). Finally, the FCRA gives consumers the right to request the information in their files, the sources used in compiling that information, the identities of the parties recently receiving credit reports on them, and other information. *See id.* § 1681g(a).

In addition to providing for administrative enforcement and criminal penalties, *see* 15 U.S.C. §§ 1681q-1681r, the FCRA provides specialized remedies for violations of the Act. For negligent violations, the Act creates a private right of action for damages sustained as the result of the violation, which entitles successful plaintiffs to attorney's fees. *See id.* § 1681o. The Act also creates a right of action for willful violations, which provides for statutory and punitive damages as well as compensatory damages and attorney's fees. *See id.* § 1681n. The limitations period in Section 618 governs the Act's private rights of action. *See id.* § 1681p.

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the Act to encompass such information.

The Imposter and the Disclosure of Respondent's Credit Records—This case arises out of an apparently innocuous visit to a doctor's office. On June 17, 1993, respondent Adelaide Andrews went to the office of a radiologist for an x-ray. Pet. App. 16a; SER 866. Because she had not been to that office before, she filled out a patient information form, listing personal information such as her birth date, social security number, and driver's license number. Pet. App. 16a; S.J.A. 46. Respondent then handed the form to a receptionist named *Andrea* Andrews, who unbeknownst to respondent at some point took the information in the form, moved to Las Vegas, and began impersonating respondent. Pet. App. 16a.

Using respondent's social security and driver's license numbers as well as a conglomeration of respondent's and her own name, the imposter rented an apartment and obtained both telephone and electric service. Pet. App. 16a. Even more importantly for present purposes, the imposter also made several attempts to obtain credit and services using respondent's identity. For example, on July 25, 1994, the imposter applied for credit with FirstConsumers National Bank (FCNB) using respondent's social security number and birth date. Pet. App. 2a, 17a. In response, the bank requested a credit report, and petitioner provided FCNB with information from respondent's file. Pet. App. 17a; S.J.A. 47-49. After reviewing the report from petitioner, FCNB denied the imposter's application. Pet. App. 17a-18a. In addition, on September 27, 1994, the imposter applied for cable service from Prime Cable of Las Vegas using respondent's social security number. Pet. App. 17a. As a locally sanctioned monopoly providing cable services, Prime Cable was required by local law to provide television service to all residents of its franchise areas and did open a cable account at the imposter's

Las Vegas residence. *See* Clark County, Nev., Code § 6.120.200(E) (1994) (SER 1051-52). Nevertheless, Prime Cable also requested a credit report, and petitioner once again provided information from respondent's file. Pet. App. 17a.

Subsequently, the imposter applied for credit with other companies, which similarly requested credit reports and petitioner again provided information from respondent's file. Pet. App. 17a; S.J.A. 52-62. These applications were likewise denied. Pet. App. 17a-18a; S.J.A. 50-52, 57. In October 1994, however, the imposter applied for credit at Dillard's department store using respondent's social security number, and Dillard's requested a credit report from Trans Union, another national credit bureau. Pet. App. 16a. Trans Union provided credit information from respondent's Trans Union file to the store, which granted the imposter credit. Pet. App. 16a-17a. The imposter's account with Dillard's eventually became delinquent. Pet. App. 17a. The imposter also failed to pay her cable bills or make her rent payments, and both accounts were eventually referred for collection. ER 75-80, 139-40; SER 883.

Respondent's Discovery of the Disclosures—In late May and early June 1995, respondent discovered the imposter's activities and the resulting disclosures of her credit records. The sequence of events began on May 31, 1995, when respondent went to a lending institution to inquire about refinancing her home mortgage. Pet. App. 18a. The institution ran a routine check on her credit with a credit reporting agency which assembled information from the three national credit bureaus at that time, Equifax, Trans Union, and petitioner TRW. *Id.* The report, which was shown to respondent, listed the imposter's delinquent Dillard's account. *Id.* Respondent then decided not to apply for refinancing from the lending institution and eventually obtained an equity line from Merrill Lynch, allegedly at a higher rate. *Id.*

That same day, respondent contacted petitioner and requested disclosure of all information in her file with petitioner. ER 133-34; S.J.A. 68-81. The disclosure provided to petitioner, which was printed on May 31, 1995, showed the Dillard's account (although not as delinquent) as well as listings of parties recently receiving credit reports on respondent. S.J.A. 72, 74-78. After reviewing the disclosure, respondent recognized that credit reports had been issued to FCNB, Prime Cable, and others based upon applications by someone else, and she contacted Dillard's, the Las Vegas Police Department, and petitioner's fraud department. S.J.A. 75; ER 133-36. By June 6, 1995, less than a week after being alerted to the problem, respondent had pieced together that Andrea Andrews was impersonating her in Las Vegas and sent out a letter informing various businesses of the imposter's activities. ER 123-24; SER 891-94. When respondent requested that petitioner delete all references to the imposter's activities, petitioner did so. Pet. App. 3a, 18a-19a.

The Proceedings Below—On October 21, 1996, almost seventeen months after discovering the imposter's activities, and more than two years after petitioner's disclosures of respondent's file to FCNB and Prime Cable, respondent sued both petitioner and Trans Union in district court. J.A. 1, 8-20. Respondent claimed that petitioner had violated the Act by disclosing those reports in connection with the imposter's activities. J.A. 15-16. Respondent also alleged that petitioner had violated the FCRA by erroneously including the imposter's account with Dillard's in her file. J.A. 16-17. In addition, respondent claimed that Trans Union had prepared inaccurate credit reports, made unauthorized disclosures of her file and, unlike petitioner, failed to reinvestigate and correct the information in that file reflecting the imposter's activities. J.A. 17-18; *see also* J.A. 18-19 (noting companion state law claims against both petitioner and Trans Union).

Prior to trial, petitioner moved for partial summary judgment on the improper disclosure claims. The district court found that the claims based upon the FCNB and Prime Cable disclosures were barred by the FCRA's statute of limitations because they were brought more than two years after the disclosures and respondent did not claim that there had been any misrepresentations of information required to be disclosed to her under the Act. Pet. App. 22a-25a. Although respondent claimed that the running of the statute of limitations was delayed until May 1995, when she discovered the disclosures, the district court disagreed. Pet. App. 23a. Following the reasoning of four circuits—including the Ninth Circuit's decision in an unpublished opinion (*see* Pet. App. at 23a-24a & n.6; *see also Allen v. Equifax Credit Info. Serv., Inc.*, No. 94-35074, 1995 WL 21422, at *1 (9th Cir. Jan. 19, 1995))— the court reasoned that the plain language of Section 618 did not incorporate a general discovery rule and that the section's explicit exception for misrepresentations precluded the implication of an additional, unstated, and more general exception. Pet. App. 23a-24a. The district court also rejected the remaining disclosure claims on the merits and entered partial summary judgment on the disclosure claims. Pet. App. 24a-34a.

Once Trans Union settled the claims remaining against it, the case went to trial on the inaccuracy claims against petitioner. J.A. 5-6. At trial, petitioner presented testimony showing that the credit records of a single individual will often have variations in them reflecting, for example, nicknames used by individuals, misspellings, and new addresses, often originating from different states. ER 701-02, 709, 717-25. Petitioner also presented evidence about the matching algorithms that petitioner has developed to accommodate these and other variations in an individual's credit profile. ER 704-25. Persuaded that the matching procedures that led to the inclusion of the imposter's activities in respondent's file were

reasonable, the jury rendered a verdict in favor of petitioner on the inaccuracy claims. Pet. App. 5a.

On appeal, the Ninth Circuit affirmed the jury's verdict on the inaccuracy claims, but vacated the district court's grant of partial summary judgment on the improper disclosure claims. Pet. App. 1a-2a. In reversing the district court's ruling on the statute of limitations, the court of appeals relied upon what it characterized as the "general federal rule that a federal statute of limitations begins to run when a party knows or has reason to know that she was injured." Pet. App. 5a. According to the Ninth Circuit, this rule is read into every federal statute "unless Congress has expressly legislated otherwise." Pet. App. 6a. Although the court of appeals acknowledged that three circuits had found that Section 618's explicit misrepresentation exception precluded the implication of a general discovery rule, the Ninth Circuit asserted that these cases disregarded the teachings of this Court. *Id.* The Ninth Circuit did not attempt to derive its general discovery rule from the language of Section 618, the overall structure of the FCRA, or the history of the Act.

SUMMARY OF ARGUMENT

The vast majority of courts, commentators, and agencies to consider whether the statute of limitations in Section 618 of the Fair Credit Reporting Act incorporates an implicit discovery rule applicable to all claims under the Act have concluded that it does not. In holding otherwise, the Ninth Circuit erred.

1. Traditionally, statutes of limitations in general and the statutes governing credit reporting claims in particular began to run when the plaintiff has a complete cause of action. *See, e.g., Rawlings v. Ray*, 312 U.S. 96, 98 (1941); *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1874). Far from departing from this rule and commencing the limitations period upon discovery of injury or any other fact, Section 618 states that the limitations period begins to run when "liability arises." 15

U.S.C. § 1681p; *see also Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997) (treating similar language as incorporating the traditional rule); *McMahon v. United States*, 342 U.S. 25, 26 (1951) (same). As Congress has enacted dozens of statutes with express discovery provisions, it cannot be deemed to have implicitly incorporated a general discovery rule when it uses language clearly and precisely expressing the traditional commencement rule.

A general discovery rule is also precluded by the limited discovery provision Congress expressly incorporated into Section 618. Under that exception, when certain misrepresentations are made, the discovery provision delays the running of the limitations period until those misrepresentations are discovered. *See* 15 U.S.C. § 1681p. As this Court has recognized in interpreting statutes of limitations and other legislation, the presence of such an express exception normally precludes the implication of any unstated exceptions. *See, e.g.*, *United States v. Brockamp*, 519 U.S. 347, 351-52 (1997); *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616 (1980). Moreover, this principle applies with special force here because the generally applicable discovery rule that the Ninth Circuit implied into Section 618 would effectively render the limited discovery provision that Congress expressly included in the statute superfluous. Thus, the plain language of Section 618 precludes the implication of the broad discovery rule adopted in the decision below.

2. The general discovery rule adopted below conflicts with the overall structure of the FCRA. The Act provides consumers wishing to bring claims under the Act with a number of rights not previously afforded by state law, which enable them to discover credit reporting claims quickly and easily. Specifically, the Act contains provisions requiring notification to consumers about the disclosure and use of their credit information, *see, e.g.*, 15 U.S.C. §§ 1681b(b), 1681d(1), 1681m(a), and it entitles consumers to access their credit files and review all information kept in them as well as the identities of parties receiving reports on the consumer, *see id.* § 1681g(a). These carefully crafted provisions make a judicially-implied rule commencing the statute of limitations upon discovery unnecessary and inappropriate. Indeed, such a rule would upset the balance struck by Congress, significantly reducing the value of the limitations period to the defendants Congress intended to protect while affording little benefit to consumers beyond a class of claims that Congress has deemed relatively insignificant. *See id.* § 1681g(3)(A) (providing for only temporary retention of records material to improper disclosure claims).

3. The decision below also conflicts with the history of the Act. In the hearings that eventually led to the FCRA, a general discovery rule was specifically suggested, but Congress chose not to adopt it. Moreover, while respondent contends that the adding the misrepresentation exception also introduced a general discovery rule, there is no mention of such a change in the legislative history. Finally, although Congress extensively revised the FCRA in 1996, it did not revise Section 618, thereby indicating its acceptance of the then-unanimous view of the courts of appeals that the section does not implicitly incorporate a general discovery rule.

4. The decision below is not saved by the novel presumption applied by the Ninth Circuit. The Ninth Circuit justified its implication of a general discovery rule based upon a presumption that the rule applies to explicit statutes of limitations "unless Congress has expressly legislated otherwise." Pet. App. 6a. This presumption conflicts with this Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), and with Congress' practice of expressly including discovery provisions in statutes of limitations. Moreover, the evidence of Congress' intent found in the text, structure, and history of the Act is more than

sufficient to overcome any presumption, no matter how stringent. Indeed, the Ninth Circuit failed to offer any plausible construction of the language of Section 618 incorporating a general discovery rule.

ARGUMENT

Prior to the decision below, nearly every court of appeals,[4] district court,[5] agency,[6] and commentator[7] to consider the

issue had rejected the suggestion that the statute of limitations in Section 618 of the Fair Credit Reporting Act, 15 U.S.C. § 1681p, implicitly incorporates a discovery provision applicable to all claims under the Act. In departing from this view, the Ninth Circuit did not—and could not—suggest that Congress intended to incorporate such a provision into Section 618. The text of that section, the overall structure of the Act, and the Act's history all demonstrate that Congress did not. Moreover, the novel presumption that the Ninth Circuit invoked to justify its conclusion is baseless and, in any event, is rebutted by the clear intent of Congress. The decision below should be reversed.

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[4] *See Allen v. Equifax Credit Info. Servs., Inc.*, 1995 WL 21422, at *1 (9th Cir. Jan. 19, 1995); *Jones v. One Valley Bank*, No. 92-2583, 1993 WL 264571, at *1 (4th Cir. July 14, 1993) (per curiam); *Clark v. State Farm Fire Cas. Ins. Co.*, 54 F.3d 669, 671-72 (10th Cir. 1995); *Rylewicz v. Beaton Servs., Ltd.*, 888 F.2d 1175, 1181 (7th Cir. 1989); *Houghton v. Ins. Crime Prevention Inst.*, 795 F.2d 322, 325 (3d Cir. 1986); *Clay v. Equifax, Inc.*, 762 F.2d 952, 960 (11th Cir. 1985); *see also Hyde v. Hibernia Nat'l Bank*, 861 F.2d 446, 448-49 (5th Cir. 1988) (holding that, in the absence of "intentional non-compliance" with the Act, the statute of limitations begins to run upon injury).

[5] *See Parker v. Parker*, No. A. 99-D-472-N, 2000 WL 1641267, at *4-5 (M.D. Ala. Sept. 21, 2000); *Lazar v. Trans Union LLC*, 195 F.R.D. 665, 669-71 (C.D. Cal. 2000); *Dornhecker v. Ameritech Corp.*, 99 F. Supp. 2d 918, 927-28 (N.D. Ill. 2000); *Gill v. Kostroff*, No. 98-930-CIV-T-17A, 2000 WL 141258, at *3-6 (M.D. Fla. Feb. 8, 2000); *Barron v. Trans Union Corp.*, 82 F. Supp. 2d 1288, 1293-94 (M.D. Ala. 2000); *McNamara v. Guazzoni*, No. 98 CIV 4085(HB), 1999 WL 322648, at *4 (S.D.N.Y. May 20, 1999); *Natale v. TRW Inc.*, No. C 97-3661 CRB, 1999 WL 179678, at *2 (N.D. Cal. Mar. 30, 1999); *Matise v. Trans Union Corp.*, No. CIV A 3:96-CV-3353-D, 1998 WL 872511, at *2-3 (N.D. Tex. Nov. 30, 1998); *Ben-Hur v. Equifax Info. Serv., Inc.*, 976 F. Supp. 795, 801-02 (E.D. Wis. 1997); *Way v. Barr*, No. HAR 94-2519, 1995 WL 307525, at *2 (D. Md. May 15, 1995) (construing Section 618 as well as parallel state statute of limitations); *Edgar v. Reich*, 881 F. Supp. 83, 84-87 (D. Mass. 1995); *Wilson v. Porter, Wright, Morris & Arthur*, 921 F. Supp. 758, 759-61 (S.D. Fla. 1995); *Scott v. Newsday, Inc.*, No. 88-0152, 1989 WL 20598, at *5 (E.D.N.Y. Mar. 3, 1989) (construing parallel state statute). One district court opinion suggests in dictum that a general discovery rule would apply to Section 618, *see Mgmt. Info. Tech., Inc. v. Alyeska Pipeline Serv. Co.*, No. 92-1730, 1993 WL 219257, at *4-6 (D.D.C. June 8, 1993) (Sporkin, J.), and another has actually applied the discovery rule to save a claim under the Act. *See McAnly v. Middleton & Reutlinger, P.S.C.*, 77 F. Supp. 2d 810, 812-14 (W.D. Ky. 1999). Neither case, however, attempts to reconcile its holding with the language, structure, or history of the Act.

[6] Financial Institutions and the Fair Credit Reporting Act, Q&A 59 (1971), *reprinted in* Consumer Credit Guide (CCH) ¶¶ 26,701, 26,709 (1999) ("Any action must be brought within two years from the date on which the liability arises, except in certain situations where there has been a material and willful misrepresentation, in which case the action may be brought within two years after discovery."); *see also Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (noting that informal agency interpretations are "entitled to respect") (quotation omitted).

[7] *See* Ralph C. Clontz, Jr., *Fair Credit Reporting Act Manual* ¶ 2.07[1], at 2-23 (Supp. 1989); Calvin C. Corman, *Limitation of Actions* 280-81 (Supp. 1993); Blair Drazic, *Handling Credit Reporting Cases* § 7:7, at 7-14 to 7-15 (1995); 15A Am. Jur. 2d, *Collection and Credit Reporting Agencies* § 64, at 237 (2000). A treatise published by the National Consumer Law Center also recognized that the FCRA generally "provides for a two year limitation period from the date on which the liability arises, not from when the consumer discovers the violation." William P. Ogburn, *Fair Credit Reporting Act* § 12.10.1, at 289 (4th ed. 1998). The most recent supplement to this treatise asserts that courts will "apply the discovery rule even to the Act's general statute of limitations" in light of the "injustice of th[e opposite] result," but fails to offer any additional rationale in support of that position. Ogburn, *Fair Credit Reporting Act* § 12.10.1.1, at 117 (Supp. 2000).

I. THE STATUTE OF LIMITATIONS IN THE FAIR CREDIT REPORTING ACT DOES NOT INCORPORATE A GENERAL DISCOVERY RULE.

As this Court has repeatedly pointed out, "'the starting point for interpreting a statute is the language of the statute itself.'" *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 25 (1989) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). "And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citation omitted). Here, the text of the Act precludes the general discovery rule the Ninth Circuit implied into the FCRA.

A. The Statute of Limitations in Section 618 Generally Begins to Run When Liability Arises, Not Upon Discovery of Injury or Other Facts.

Section 618 does not normally condition the running of the Act's statute of limitation on the discovery of any fact. Quite the contrary, it adopts the traditional commencement rule beginning the statute when the formal right to sue under the Act attaches.

Under the traditional commencement rule, statutes of limitations begin to run when the plaintiff has a "complete and present cause of action." *Rawlings v. Ray*, 312 U.S. 96, 98 (1941); *see also Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1874) ("All statutes of limitations begin to run when the right of action is complete . . . ."). In other words, limitations periods traditionally begin to run "at the time of the occurrence of a judicially recognizable injury or event constituting a breach of duty . . . even though the plaintiff was unaware of the accrual of his or her cause of action." II Calvin C. Corman, *Limitation of Actions* § 11.1.1, at 134 (1991); *see also Restatement (Second) of Torts* § 899, cmt. e (1979); (noting that statutes of limitations ordinarily begins to run when "from the time the tort was committed although the injured person has no knowledge or reason to know of" the tort committed against him) 2 H.G. Wood, *Limitation of Actions* § 276c, at 88-90 (4th ed. 1916) ("Mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitations unless there has been fraudulent concealment on the part of those invoking the benefit of the statute.")

The traditional rule is still the norm in most areas of the law. *See, e.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); *see generally* II Corman, *Limitation of Actions* § 11.1.1, at 134. Since the middle of the last century, the discovery rule, which delays the running of the statute of limitations until discovery of injury or some other crucial fact, has been extended outside the fraud context in which it was originally developed into areas such as medical malpractice and products liability. *See generally* II Corman, *Limitation of Actions* § 11.1. The rule is not, however, generally applied to defamation and invasion of privacy, the types of claims normally brought in connection with credit reporting, *see, e.g.*, Francis M. Dougherty, *Limitation of Actions: Time of Discovery as Determining Accrual of Action*, 35 ALR 4th 1002 § 2 (1985), and it was clear at the time the FCRA was enacted that credit reporting claims were subject to the traditional commencement rule, not the discovery rule. *See, e.g.*, *Wilson v. Retail Credit Co.*, 457 F.2d 1406 (5th Cir. 1972); *Atwell v. Retail Credit Co.*, 431 F.2d 1008 (4th Cir. 1970); *Peacock v. Retail Credit Co.*, 302 F. Supp. 418, 422 (N.D. Ga. 1969), *aff'd*, 429 F.2d 31 (5th Cir. 1970); 50 Am. Jur. 2d *Libel and Slander* § 390, at 912 (1970). As federal statutes covering areas traditionally regulated by the common law are presumed to retain long-established principles, the FCRA would have to adopt the discovery rule directly to depart from that tradition. *See, e.g.*, *United States v. Texas*, 507 U.S. 529, 534 (1993); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952).

Far from abandoning the traditional commencement rule, Section 618 expressly embraces it. Section 618 states that "[a]n action to enforce any liability created under this subchapter may be brought . . . within two years from the date on which *liability arises*." 15 U.S.C. § 1681p (emphasis added). Under the Act, however, liability does not arise when a consumer learns that he or she has been injured or that a violation of the Act has occurred. Instead, the Act makes a person who is "negligent in failing to comply with any requirement imposed" by the Act with respect to a consumer "liable to that consumer in an amount equal to the sum of [] any actual damages sustained by the consumer as a result of the failure." *Id.* § 1681o(a); *see also id.* § 1681n(a) (providing for punitive and statutory as well as compensatory damages for willful violations). Thus, where, as here, a consumer seeks damages from a credit reporting agency for improperly disclosing credit information, the statute of limitations begins to run when the disclosure is made, because it is at that point that the agency violates the Act, the consumer's intent in keeping credit information private is invaded, and the agency becomes liable for any alleged damages.

This conclusion is supported by this Court's construction of similarly worded statutes of limitations. For example, in *McMahon v. United States*, 342 U.S. 25 (1951), this Court considered the statute of limitations in the Suits in Admiralty Act, 46 U.S.C. App. §§ 741-52, which requires suits under that act to "be brought within two years after the cause of action arises." 46 U.S.C. App. § 745. The plaintiff in *McMahon* contended that the limitations period did not begin running until the Government disallowed his administrative claim because the Suits in Admiralty Act barred him from suing until that denial. *See McMahon*, 342 U.S. at 26. This Court disagreed. It held that "the proper construction of the language used in the Suits in Admiralty Act is that the period of limitation is to be computed from the date of injury." *Id.* at 27; *see also id.* (noting that the plaintiff's interpretation would permit claimants to "postpone indefinitely" the running of the statute of limitations).

In a more recent case, this Court reached a similar conclusion. It observed that a statute of limitations commencing when "the cause of action arose," 29 U.S.C. § 1451(f)(2), "incorporates the standard rule that the limitations period commences when the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997) (quoting *Rawlings*, 312 U.S. at 98). Thus, this Court's decisions recognize that the language in Section 618 is most naturally read to incorporate the traditional commencement rule, not the discovery rule.

Nor is there any reason to think that Congress meant to incorporate the discovery rule when it used language expressing the traditional rule. Congress knows how to incorporate the discovery rule into a statute of limitations. In more than a dozen statutes enacted since 1933, Congress has explicitly linked the commencement of a limitations period to discovery of a claim or fact. *See, e.g.*, 15 U.S.C. § 77m (authorizing securities claims brought within one year "after the *discovery* of the untrue statement") (emphasis added).[8] Other statutes commence the limitations period when the plaintiff "knew or should have known" of a claim or facts relating to its claim,[9] and still others provide that the statute of limitations commences running upon actual knowledge of some fact.[10] Moreover, in enacting the FCRA, Congress did not simply overlook the special case of when a plaintiff is not immediately aware of his or her injury. Congress was well aware that, because consumers are not directly involved in the sale and use of credit reports, they are often not immediately aware that they have been damaged by an adverse credit report. *See* S. Rep. No. 91-517, at 3 (1969); *see also infra* pp. 35 - 36 (discussing congressional hearings). Thus, there is no reason to think that, when Congress stated that the statute of limitations in Section 618 commences when "liability arises," 15 U.S.C. § 1681p, it really meant the statute to commence upon discovery of some fact that may not occur until long after the defendant becomes subject to liability. *See, e.g.*, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (citations omitted).

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[8] *See also* 5 U.S.C. § 6304(e) (authorizing claims for annual leave payments brought within three years "immediately following the date of *discovery* of the error") (emphasis added); 10 U.S.C. § 1552(b) (authorizing claims to correct military records brought within three years after claimant "*discovers* the error or injustice") (emphasis added); 12 U.S.C. § 1715z-4a(d) (authorizing certain housing claims brought within six years after the government "*discovers* any use of project assets and income in violation of the regulatory agreement" or other applicable rule or regulation) (emphasis added); 12 U.S.C. § 3416 (authorizing claims brought within three years of "the date of *discovery* of [the] violation") (emphasis added); *id.* § 77www(a) (authorizing claims "brought within one year after the *discovery* of the facts constituting the" claim) (emphasis added); *id.* § 78i(e) (same); *id.* § 78r(c) (same); *id.* § 78cc(b) (same); *id.* § 3006(c) (authorizing claims filed within three years of "the *discovery* of the alleged violation upon which such civil action is based") (same); *id.* § 1711(a)(2) (claims must be brought within three years of "*discovery* of the violation or after discovery should have been made by the exercise of reasonable diligence") (emphasis added); *id.* § 6104(a) (authorizing

This Court's occasional incorporation of the discovery rule into statutes of limitations that commence upon "accrual" of a claim does not suggest otherwise. While this Court has generally interpreted such statutes to begin running when there is a "a complete and present cause of action," *Rawlings*, 312 U.S. at 98, it has sometimes indicated that the discovery rule governs certain claims under a statute of limitations commencing upon accrual. *See, e.g.*, *United States v. Kubrick*, 444 U.S. 111, 120 (1979) (indicating that the discovery rule applies to medical malpractice claims under the statute of limitations in the Federal Torts Claim Act, 28 U.S.C. § 2401(b)); *Urie v. Thompson*, 337 U.S. 163, 169-70 (1949) (indicating that the discovery rule applies to latent injuries under the statute of limitations in the Federal Employers' Liability Act, 45 U.S.C. § 56). These decisions do not, however, suggest any general warrant to disregard the plain language of statutes of limitations; instead, they reflect the elastic nature of the word "accrual."

The word "accrue" is defined to mean "to come into existence as an enforceable claim." *Webster's Third New Int'l Dictionary* 13 (1976); *accord Black's Law Dictionary* 21 (7th ed. 1999). As a consequence, a statute conditioned upon the

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claims brought "within three years after *discovery* of the violation") (emphasis added); 18 U.S.C. § 2710(c)(3) (authorizing claims brought by "the date of *discovery*") (emphasis added); 19 U.S.C. § 1621 (authorizing claims "commenced within five years after the time when the alleged offense was discovered"); 26 U.S.C. § 7431(d) (authorizing claims brought within two years "after the date of *discovery* by the plaintiff of the unauthorized inspection or disclosure") (emphasis added); 42 U.S.C. § 9612(d)(2)(A) (authorizing claims for recovery of damages brought within three years of the "date of the *discovery* of the loss and its connection with the release in question") (emphasis added); *id.* § 9613(g)(1) (same).

[9] *See, e.g.*, 28 U.S.C. § 2409a(g) (deeming quiet title claims against United States to accrue on "the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States"); 28 U.S.C. § 2416 (providing that, for suits brought by the United States, the statute of limitations does not run until "facts material to the right of action are [] *known* [or] *reasonably could* [] *be known* by an official . . . charged with the responsibility to act in the circumstances"); 31 U.S.C. § 3731(b) (authorizing claims brought within three years of "the date when facts material to the right of action are known or reasonably should have been known"); 18 U.S.C. § 2520(e) (authorizing claims brought within "two years after the date upon which the claimant first has a reasonable opportunity to discover the violation").

[10] *See, e.g.*, 5 U.S.C. § 8477(e)(6)(B) (providing that claim must be filed within three years from "the earliest date on which the plaintiff had actual knowledge of the breach or violation"); 29 U.S.C. § 1113(2) (authorizing actions brought within three years of the "date on which the plaintiff had actual knowledge of the breach or violation"); *see also* 7 U.S.C. § 2566(a) (providing that "[n]o recovery shall be had for that part of any infringement committed more than six years (or known to the owner more than one year) prior to the filing of the complaint or counterclaim for infringement in the action").

"accrual" of a claim can be interpreted to commence when a claim becomes formally enforceable (the traditional rule) or when it becomes practically enforceable (the discovery standard). Accordingly, as this Court has long observed, the word accrue lacks any "'definite technical meaning,'" and statutes of limitations predicated upon accrual must be interpreted "'in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought.'" *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967) (quoting *Reading Co. v. Koons*, 271 U.S. 58, 61-62 (1926)).

The phrase "liability arises" is not so malleable. The point at which liability attaches is determined by the substantive provisions of a statute. As a consequence, a limitations period predicated upon liability does not permit courts to engage in the sort of broad ranging policy inquiry that an accrual statute invites. No doubt because of this fact, Congress has used a variation of the phrase "liability arises" to distinguish the traditional commencement rule from the discovery rule. *See, e.g.*, 29 U.S.C. § 1451(f)(1) (providing that an action may not be brought after the later of "6 years after the date on which the *cause of action arose*" or 3 years after discovery) (emphasis added); *id.* § 1303(e)(6) (same); *id.* § 1303(f)(5) (same); *id.* § 1370(f) (same). Thus, the fact that this Court occasionally construes an "accrual" statutes to incorporate the discovery rule simply underscores Congress' decision to use language in Section 618 that cannot be interpreted to do so.

B. The Limited Discovery Provision in Section 618's Misrepresentation Exception Precludes Implication of a More General Discovery Rule.

In addition to incorporating the traditional commencement rule, Section 618 also expressly includes a limited discovery rule that applies when certain misrepresentations are made. This express exception to the traditional commencement rule

precludes implication of a general discovery rule into that section.

1. Section 618's Express Exception for Certain Misrepresentations Precludes Implication of Additional Unstated Exceptions.

Under the misrepresentation exception, where a defendant has "materially and willfully misrepresented any information required under this subchapter to be disclosed," and the information misrepresented is "material to the establishment of the defendant's liability . . . . under this [title]," a claim based upon that liability may be brought "within two years after discovery by the individual of the misrepresentation." 15 U.S.C. § 1681p.[11] The presence of this express exception to the general rule governing claims under the Act precludes implication of an unstated exception such as a general discovery rule.

It is well-settled that where Congress explicitly enumerates exceptions to a statute, additional unstated exceptions generally cannot be implied into the statute. *See, e.g.*, *United States v. Smith*, 499 U.S. 160, 167 (1991) ("Congress' express creation of these two exceptions [in the FTCA] convinces us that the Ninth Circuit erred in inferring a third exception . . . ."); *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."); *American Bank & Trust Co. v. Dallas Cty.*, 463 U.S. 855, 864 (1983) ("From the specific exceptions for franchise and estate and inheritance taxes, and the conspicuous omission of share taxes from that group, only one inference is possible: Congress meant to bar share taxes . . ."); *see generally* 2A Norman J. Singer, *Statutes & Statutory Construction* § 47:23, at 317 (6th ed. 2000).

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[11] The misrepresentation exception provides in full:

> where a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability under this subchapter, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

15 U.S.C. § 1681p.

As previous decisions of this Court make clear, this interpretive principle applies to statutes of limitations and, in particular, to doctrines affecting the running of such statutes. For example, in *United States v. Brockamp*, 519 U.S. 347 (1997), this Court reversed a Ninth Circuit decision (which, like the decision below, contradicted all other circuits to consider the issue) holding that a limitations provision in the Internal Revenue Code contains an implicit equitable tolling exception. *See id.* at 348-49. Although there is a long-standing presumption that federal statutes of limitations incorporate equitable tolling doctrines, this Court found the presumption rebutted by the language of the provision because, among other things, that language "sets forth explicit exceptions to its basic time limits" that "do not include 'equitable tolling.'" *Id.* at 351; *see also id.* at 352 (noting that the statute's "detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and *the explicit listing of exceptions*" preclude the implication of any equitable exceptions) (emphasis added). Similarly, this Court has refused to permit equitable tolling of the limitations period in the Quiet Title Act, 28 U.S.C. § 2409a, because the statute contains an express exception for plaintiffs justifiably unaware of a claim by the United States. *See United States v. Beggerly*, 524 U.S. 38, 48-49 (1998); *see also Soriano v. United States*, 352 U.S. 270, 275-76 & n.7 (1957) (refusing to imply equitable tolling for time of war in light of statutes passed to provide such tolling). Where, as here, unstated exception would replace rather than incorporate a traditional doctrine, the presence of an express exception even more clearly precludes the unstated one.

2. A General Discovery Rule Would Render the Limited Discovery Provision in the Misrepresentation Exception Superfluous.

The misrepresentation exception also precludes the implication of a general discovery rule because such a rule would render the limited discovery provision in the exception superfluous and read out of the Act the misrepresentation requirement upon which Congress specifically conditioned application of the discovery rule.

The misrepresentation exception is primarily concerned with misrepresentations by credit reporting agencies concerning reports that contained inaccurate information or that were disclosed to improper parties. By delaying the running of the statute of limitations when a credit reporting agency makes misrepresentations material to potential inaccuracy or improper disclosure claims against them, the exception prevents credit reporting agencies from concealing the basis of such claims from consumers and then invoking the statute of limitations when the consumer is unable to bring his or her claims within the limitations period. Thus, if a credit reporting agency improperly discloses a report to a party and then fails to identify that party when the consumer seeks to know who has received reports about her, as the Act entitles her to do, *see* 15 U.S.C. § 1681g(a)(3), the misrepresentation exception delays the commencement of the statute of limitations until the consumer learns of the concealed disclosure. Similarly, if a credit reporting agency provides a user with inaccurate information on a consumer and then hides that information when the consumer invokes her right to inspect the information in her file, *see id.* § 1681g(a)(1), the exception delays the limitations period until discovery of the concealed information.

As a practical matter, a general discovery rule would operate in exactly the same manner. In the first place, such a rule would apply where the misrepresentation exception applies. Discovery rules are normally intended to protect would-be plaintiffs who are "blamelessly ignoran[t]" of their claims under the Act. *Urie*, 337 U.S. at 170; *see generally* II Corman, *Limitation of Actions* § 11.1.1, at 34. A consumer who is unaware of a misrepresentation about an improper disclosure or about the existence of inaccurate information in her files is ignorant of her claims, and if a consumer has sought information in her files that would reveal those claims but that information is misrepresented, that consumer can hardly be blamed for not yet discovering the claims. Thus, where a plaintiff is able to invoke the misrepresentation exception, the plaintiff is also blamelessly ignorant of her claims and therefore protected by a general discovery rule.

Second, the limitations period under a general discovery rule would commence at the same time as the period under the exception's limited discovery provision because a party discovering a misrepresentation about an improper disclosure or the existence of inaccurate information in her file will discover her claims for inaccuracy and improper disclosure at the same time, and visa versa. Third, under a general discovery rule, the statute of limitations would run for the same two-year period as the limited discovery provision in the misrepresentation exception because that provision uses the same two-year period as Section 618 in general. *See* 15 U.S.C. § 1681p. Thus, a general discovery rule would apply in the same circumstances as the misrepresentation exception and delay the statute of limitations in the same manner as the exception's discovery provision, thereby rendering the exception superfluous.

Because a general discovery rule would effectively read the misrepresentation requirement Congress specifically imposed on the discovery rule in Section 618 out of the Act, any interpretation of the Act that unnecessarily implies such a rule into Section 618 must be rejected. As this Court has repeatedly recognized, it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *see also Walters v. Metro. Educ. Enter., Inc.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect."); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty to 'give effect, if possible, to every clause and word of a statute.'") (quoting *Inhabitants of the Township of Montclair v. Ramsdell*, 107 U.S. (17 Otto) 147, 152 (1883)); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy."). As a general discovery rule would basically swallow the limited discovery provision in the misrepresentation exception, such a rule cannot be implied into Section 618.

II. THE GENERAL DISCOVERY RULE CONFLICTS WITH THE STRUCTURE OF THE FAIR CREDIT REPORTING ACT

"It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Food & Drug Adm'n v. Brown & Williams Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Here, the overall structure of the Act reinforces what the language of Section 618 demonstrates: that the section does not incorporate a general discovery rule. Indeed, a general discovery rule would upset the balance struck by Congress in Section 618.

A. The Notification and Access Provisions of the FCRA Ensure Prompt Discovery of Violations of the Act.

The carefully crafted notice and access provisions in the FCRA make a judicially implied discovery rule both unnecessary and inappropriate.

The FCRA imposes a number of notification requirements that inform consumers about the disclosure and use of their credit information. For example, to obtain an "investigative consumer report"—the intrusive sort of report containing not only financial information, but also "information on a consumer's character, general reputation, personal characteristics, or mode of living" (15 U.S.C. § 1681a(e))—a would-be user must "clearly and accurately disclose[] to the consumer" that such a report may be requested. *Id.* § 1681d(1). Similarly, to obtain even a regular credit report for employment purposes, an employer must normally provide a "clear and conspicuous disclosure" to the consumer that such a report may be requested and obtain the consumer's written authorization for doing so. *Id.* § 1681b(b)(2)(A).

Even more importantly, the Act requires disclosure of adverse actions taken, in whole, on the basis of a consumer report. The Act states that "[i]f any person takes adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report," the consumer must be notified of the action and the agency that supplied the report. 15 U.S.C. § 1681m(a). Moreover, the Act defines adverse action broadly to include the denial of credit, insurance, employment, public licenses or benefits, or any other action taken in connection with a transaction by the consumer that is adverse to the consumer's interest. *See id.* §§ 1681a(k), 1691(d)(6).

As pointed out above, *see supra* pp. 4, 23, the FCRA also entitles consumers to access files kept on them by consumer reporting agencies and information concerning the use of those files. For example, upon a consumer's request, the Act requires agencies to disclose "[a]ll information in the consumer's file at the time of the request." 15 U.S.C. § 1681g(a)(1). In addition, the Act entitles consumers to "[i]dentification of each person . . . that procured a consumer report . . . during the 1-year period preceding the date on which the request is made." *Id.* § 1681g(a)(3)(A); *see also id.* § 1681(a)(3)(A)(i) (requiring identification of persons requesting reports for employment purposes for a two-year period). Other access provisions entitle consumers to know the sources of most of the information in the files, as well as information concerning delinquent checks and prescreening inquiries for mass solicitations. *See id.* §§ 1681(g)(a)(2), (a)(4) & (a)(5).

These notification and access provisions work together to enable consumers to discover violations of the Act in a timely fashion. For example, if an individual is denied credit, insurance, or employment because of inaccurate information in a credit report, the Act's notification provisions require that the individual will be notified that the denial resulted from the report, and the access provisions entitle that individual to discover the inaccuracy in the report. Moreover, to facilitate this process, consumers seeking access within sixty days of notification of an adverse action have the right to review their file free of charge. *See* 15 U.S.C. § 1681j(b). *But see id.* § 1681j(a)(1)(A) (providing that the fee otherwise payable for access shall not exceed $8, adjusted for inflation). Similarly, when an investigative consumer report is requested improperly, the Act's notification provisions require that the consumer be informed of the request, and the access provisions entitle him to discover the improper nature of the request by demanding to know the nature and scope of the investigation, as well as the identity of that party. *See id.* §§ 1681d(b), 1681g(a)(3)(A). Thus, the FCRA provides consumers with the means to discover quickly any improper disclosure of an investigative report and any inaccurate information in their files that has harmed them.

Because the Act does not require notification of every request for an ordinary credit report, it does not provide consumers with automatic notification of every potentially improper disclosure of a credit report. Nonetheless, the access provisions provide consumers with a powerful tool for discovering any disclosures of financial information which, while not resulting in any adverse actions, nonetheless invade their privacy. First, as the FTC and privacy advocates recommend, consumers can monitor their credit files for any such disclosures by requesting copies of their files once a year.[12] Indeed, petitioner made available to every consumer a free copy of his or her file disclosure once each year, regardless of whether the consumer recently had been advised of an adverse action based upon a credit report. SER 842.

Second, as the facts of this case demonstrate, the FCRA's access provisions enable consumers to identify improper disclosures quickly once they have reason to suspect such a disclosure. In meeting with a lending institution on May 31, 1995 to discuss refinancing her home mortgage, respondent learned that there was a problem with her credit report, and by requesting access to her file, within less than one week she was able to learn that reports on her had been disclosed to Prime Cable, FCNB, and other businesses in Las Vegas, that a delinquent account at Dillard's was being attributed to her (in Trans Union's files), and that an imposter had assumed her identity. *See supra* pp. 6 - 7. Thus, by using the FCRA's access provisions, respondent discovered the basis for the improper disclosure claims before this Court less than one year after the first allegedly improper disclosure occurred—and more than a year before the limitations period on the first disclosure before this Court expired.

B. A General Discovery Rule Would Upset the Balance Struck by Congress in the Act.

By providing an unnecessary alternative mechanism for ensuring discovery of claims before the statute of limitations expires, a general discovery rule would upset the balance that Congress struck in setting the limitations period in Section 618 and fixing the document retention requirement in Section 609.

Statutes of limitations strike a balance between competing interests. On the one hand, the public has an interest in "'protecting valid claims.'" *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (quoting *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975)). On the other hand, both defendants and the public have significant interests in repose, which is the "basic objective . . . that underlies limitations periods." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997). For example, statutes of limitations are "relied upon to project the liabilities of persons and corporations active in the commercial sphere," *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988); *accord Wilson*, 471 U.S. at 275 n.34, and they establish a "deadline after which the defendant may legitimately have peace of mind," *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980); *see generally* Richard A. Epstein, *The Temporal Dimension in Tort Law*, 53 U. Chi. L. Rev. 1175, 1182 (1986). In addition, statutes of limitations limit the litigation of claims after memories have faded, witnesses have disappeared, and other evidence has disappeared. *See, e.g.*, *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); *see also* Epstein, *supra*, at 1181-82 (noting that stale claims increase "the expense of litigation and the error rate"). Accordingly, a statute of limitations "reflects a value judgment concerning the point at which interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Johnson*, 421 U.S. at 463-64; *see also Wood v. Carpenter*, 101 U.S. (11 Otto) 135, 139 (1879) (noting that statutes of limitations are "vital to the welfare of society" and "approved in all systems of enlightened jurisprudence").

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[12] *See, e.g.*, Federal Trade Comm'n, *ID Theft: When Bad Things Happen to Your Good Name*, *available at* http://www.ftc.gov/bcp/conline/pubs/credit/idtheft.htm (recommending that consumers "[o]rder a copy of your credit report from the three credit reporting agencies every year") (visited 4/17/01); Privacy Rights Clearinghouse, *Fact Sheet #1: Privacy Survival Guide—How to Take Control of Your Personal Information*, *available at* http://www.privacyrights.org/fs/fs1-surv.htm (same) (visited 4/17/01).

The addition of a discovery rule to a statute of limitations significantly alters this balance. By delaying the commencement of the limitations period where applicable, a discovery rule increases the effective length of time during which a defendant is subject to suit. *See Klehr*, 521 U.S. at 187 (noting that a discovery rule that "lengthens the limitations period dramatically" conflicts with the statute of limitations' "basic objective" of ensuring repose); *id.* at 199 (Scalia, J., concurring in part and concurring in the judgment) ("[A]ny period of limitation is utterly meaningless without specification of the event that starts it running."). In so doing, the rule affords greater protection to valid claims (so long as a plaintiff acts diligently). At the same time, however, by increasing the effective period in which claims may be brought, the discovery rule decreases the certainty the statute affords and increases the risk of litigating stale claims. Thus, application of the discovery rule tips the balance struck by a statute of limitations in favor of protecting claims and against repose.

Moreover, under the FCRA, a general discovery rule would have an especially great impact on the policies favoring repose because, in addition to imposing increased uncertainty upon credit reporting agencies, the rule would directly increase their costs of doing business. Credit reporting is an information business. The industry sells more than 550 million reports each year, which translates into approximately 2 million reports each work day. *See* Ogburn, *Fair Credit Reporting Act* § 1.2, at 27. Moreover, the national credit bureaus alone maintain files on nearly two hundred million consumers, which files are updated monthly with more than two billion pieces of information. *See id.* By extending the effective length of time in which claims may be brought, a general discovery rule would require credit reporting agencies to retain records for longer periods of time, thereby adding to the credit industry's already massive burden of storing information.

By contrast, a general discovery rule would not significantly further the public's interest in protecting valid claims. The notice and access provisions of the Act ensure that, absent a misrepresentation triggering the limited discovery provision in the misrepresentation exception, consumers will discover most serious claims under the Act well within the limitations period. As explained above, the Act's notification provisions ensure that consumers are informed of any denial of credit, loss of employment, or other adverse action taken as a result of inaccurate credit reports. *See supra* p. 26. The Act also entitles plaintiffs to notification when any intrusive investigative report has been requested. *See id.* As the Act also provides for consumer access to their files, *see supra* pp. 26-27, it enables consumers to discover claims based upon inaccuracy or improper disclosure of investigative reports quickly after they arise, thereby eliminating the need for a broad discovery rule. Moreover, while the Act does not guarantee notice of the disclosure of ordinary credit reports, it does provide consumers with access to their files, which, as the facts of this case demonstrate, allows plaintiffs claiming improper disclosure to discover such disclosures almost as soon as they have reason to suspect them. *See supra* pp. 28-29. Thus, the need for a general discovery rule under the FCRA is limited at best.

Nor can a general discovery rule be justified by the possibility that some plaintiffs with claims for the improper disclosure of financial information may not have reason to inspect their files for such disclosures. Far from suggesting that concern over this narrow class of claims justifies a general discovery rule covering all claims under the FCRA, Congress has clearly indicated the opposite in Section 609 of the Act. In that section, Congress requires disclosure to consumers of the identity of persons procuring consumer reports as well as any ultimate end-users of such reports. *See* 15 U.S.C. § 1681g(a)(3). However, recognizing the cost to the industry of retaining such records, Congress limited this obligation to the "1-year period preceding the date on which the request [for disclosure to the consumer] is made." *Id.* § 1681g(a)(3)(A)(2); *see also id.* § 1681g(a)(3)(A)(1) (noting that the identities of individuals requesting reports for employment purposes must be provided for a two-year period). Indeed, when the FCRA was initially enacted, the Act only required that this information be provided for a six month period prior to the disclosure request. *See* FCRA, Pub. L. No. 91-508, § 609, 84 Stat. 1131. Obviously, if Congress had seen a compelling need to protect claims of improper disclosure that might not be discovered immediately and was willing to extend the practical length of the limitation period, it would not have effectively authorized credit reporting agencies to destroy key evidence concerning such disclosures within any version of the stated limitations period. Thus, Section 609 demonstrates that Congress did not consider ordinary improper disclosure claims to warrant protection for two years beyond the date of the disclosure, much less a discovery rule effectively extending the limitations period on all types of claims under the Act.

C. Even Without a General Discovery Rule, Section 618 Improves the Ability of Consumers to Bring Credit Reporting Claims.

It is particularly inappropriate for the Ninth Circuit to rewrite the text of the FCRA and upset the balance struck by the Act by adding a general discovery rule because the Act already ensures fair treatment of would-be plaintiffs with credit reporting claims.

When the FCRA was enacted in 1970, consumers did not have any right to notice that credit or even investigative reports on them had been requested, and they had no right to access their files. *See, e.g., Wilson v. Retail Credit Co.*, 438 F.2d 1043, 1045 (5th Cir. 1971); *see generally* Virginia G. Mauer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 Geo. L.J. 95, 99-100 (1983). The statutes of limitations governing defamation and invasion of privacy claims, the theories normally employed in credit reporting cases, were generally less than two years long, *see, e.g., Wilson*, 438 F.2d at 1045 (applying one-year limitations period); *see generally* 50 Am. Jur. 2d, *Libel and Slander* § 390, at 911; 62A Am. Jur. 2d, *Privacy* § 176, at 793-94 (1990), and those statutes generally began running upon disclosure of a credit report whether or not the consumer was aware of a claim, *see supra* p. 15. As a consequence, before the FCRA was passed, plaintiffs bringing credit reporting claims often had no way to discover their claims before the short statutes of limitations applicable to them expired. *See* Blair Drazic, *Handling Credit Reporting Cases* § 7:7, at 7-11 to 7-12 (1995); *see also* Maurer, *Common Law Defamation and the FCRA*, 72 Geo. L.J. at 99-100 (noting that a defamation plaintiff was "unlikely to discover the existence of the erroneous information at the root of his credit problems until the statute of limitations precluded relief"). Thus, even without a general discovery rule, through its notice and access provisions, the FCRA placed consumers bringing claims under the Act in a far better position to discover and bring claims within the relevant limitations period than they had previously enjoyed.

Moreover, the FCRA leaves consumers free to take advantage of subsequent favorable developments in state law. In recent years several states have extended a discovery rule to cover defamation claims involving credit reports, *see, e.g., Sears, Roebuck & Co. v. Ulman*, 412 A.2d 1240, 1243-44 (Md. 1980); *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*, 334 N.E.2d 160, 164-65 (Ill. 1975), and some states have fair credit reporting statutes that explicitly incorporate general discovery provisions. *See* Cal.

Civ. Code § 17853; Ga. Code Ann. § 10-1-401(a); Ohio Rev. Code Ann. § 3904.21(D).[13] By providing that the Act generally "does not annul, alter, affect, or exempt any person" from complying with state tort law, 15 U.S.C. § 1681t(a), the FCRA permits plaintiffs to bring credit reporting claims under state law and take advantage of such developments. *See, e.g.*, *Cushman v. Trans Union Corp.*, 115 F.3d 220, 227-29 (3d Cir. 1997) (permitting plaintiff to sue under state statute); *Catrone v. Thoroughbred Racing Ass'n of N. Am., Inc.*, 929 F.2d 881, 888-89 (1st Cir. 1991) (permitting common law claim). Thus, while Section 618 requires consumers bringing claims under the FCRA's specialized causes of action to rely on the Act's notice and access provisions to discover such claims, it leaves them free to take advantage of any state laws subject to statutes of limitations incorporating the general discovery rule or other more liberal limitations provisions.

Finally, while statutes of limitations inevitably impose "the price of occasional unfairness in individual cases," *United States v. Brockamp*, 519 U.S. at 353, there is no such unfairness here. Despite being initially unaware of the

disclosure of her credit reports in connection with the imposter's activities, respondent was able to learn of the imposter's activities more than a year before the statute of limitations had run by invoking the Act's access provisions. *See supra* pp. 6-7. Barring respondent's improper disclosure claims would not be inequitable under those circumstances. Indeed, respondent's year-long delay in bringing the claims in question would preclude respondent from relying upon even an equitable tolling doctrine. *See, e.g.*, *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir. 1990) (holding that "a plaintiff who invokes equitable tolling to suspend the statute of limitations must bring suit within a reasonable period of time after he has obtained, or by due diligence could have obtained, the necessary information"); *see generally* 54 C.J.S. *Limitation of Actions* § 87b (1987). Thus, the facts of this case underscore that the general discovery rule is not needed to ensure that the Act treats plaintiffs fairly.

III. THE GENERAL DISCOVERY RULE ALSO CONFLICTS WITH THE HISTORY OF THE FAIR CREDIT REPORTING ACT.

Although respondent sought to rely upon the legislative history of the Act in opposing certiorari, *see* Resp. Cert. Opp. at 20-22, there is no reason to consult that history. As this Court has recognized, courts should "not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). In any event, nothing in the legislative history even begins to suggest that Congress intended to incorporate the general discovery rule into Section 618. To the contrary, both the legislative history of the Act and its subsequent history confirm that Congress had no such intention.

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[13] California's discovery provision has an illuminating history. Prior to 1997, the state's fair credit reporting statute contained a limitations provision patterned after Section 618 that required claims to be brought "within two years from the date on which liability arises." Cal. Stat. 1975, ch. 1271, § 1, at 3377. In 1997, this provision was amended to provide that suits may be brought "within two years from the date plaintiff knew or, or should have known of, the violation of this title. . . ." Amended Cal. Stat. 1997, ch. 768, § 5 (AB 156), 1997 Cal. Legis. Serv. 4169 (West 1997); *see also id.* (providing that claims shall be brought "not more than seven years from the earliest date on which liability could have arisen"). This change was prompted by concern that under the language borrowed from Section 618 "the consumer may not become aware of [a statutory] violation until after the statute of limitations expires. . . ." Cal. Dep't of Consumer Affairs, Recommendation Concerning AB 156, at 6 (Sept. 11 and 12, 1997). Thus, the California legislature amended its fair credit reporting statute to include a general discovery rule because it found that language identical to Section 618 did not incorporate such a rule.

A. Congress Rejected a Proposal to Incorporate the General Discovery Rule into the Act.

When Congress enacted the FCRA, it was well aware of the problems that consumers faced in discovering injuries caused by credit reporting. In both the House and the Senate, hearings noted the "organized conspiracy of silence," the "wall of silence," and the "shroud of secrecy" then around the credit reporting industry. *See Hearings before the Subcomm. on Consumer Affairs of the Comm. on Banking and Currency*, 91st Cong. 270 (1970) [hereinafter "*House Hearings*"]; *Hearings on S. 823, Before the Subcomm. on Financial Institutions of the Comm. on Banking and Currency* 91st Cong. 2 (1969) [hereinafter "*Senate Hearings*"]. Both houses also heard stories of an individual whose career was effectively destroyed by credit records containing false information, without his suspecting that information for years, *see House Hearings* 78-81; *Senate Hearings* 78-89, and the Senate Report specifically recognized that "the inability at times of the consumer to know he is being damaged by an adverse credit report." S. Rep. No. 91-517, at 3.

Even more pertinently, a general discovery rule was specifically suggested to Congress but not adopted. In 1970, a young Professor Arthur Miller, then of the University of Michigan, testified before Congress. *See House Hearings* 182-210. In his prepared statement before the House, Professor Miller recommended that the Act's statute of limitations "should be measured 'from the date of the occurrence of the violation *or the date on which the violation is discovered*.'" *Id.* at 188 (emphasis added). This proposal was not, however, incorporated in any suggested amendment to the credit reporting bills then in Congress or to the amendment to the banking legislation that ultimately became the FCRA. *See generally* Ogburn, *Fair Credit Reporting Act* § 1.4 (discussing the legislative history of the Act); *see also infra* p. 37 (discussing bills). Moreover, when the House demanded changes to Section 618 in conference, it suggested adding the misrepresentation exception with its limited discovery provision, *see* H.R. Rep. No. 91-1587, at 30 (1970), not the broad ranging discovery rule proposed by Professor Miller or the one implied by the Ninth Circuit in the decision below. Thus, by implying a general discovery rule into Section 618, the Ninth Circuit improperly embraced an innovation specifically rejected by Congress.

B. The Amendment of Section 618 Does Not Support Respondent's Interpretation.

Either unaware or undeterred by these facts, respondent has asserted that the legislative history, and in particular the changes made in conference, supports her position. When the bill that formed the model for the FCRA was introduced in the Senate in January 1969, the statute of limitations in it permitted suits brought "'within two years from the date of the occurrence of the violation.'" 115 Cong. Rec. 2416 (1969) (reading S. 91-823). Bills introduced in the House contained similar language, with the most successful bill providing for a five-year period. *See* H.R. 91-16340, at 10 (1970) (providing for claims brought "within five years from the date of the occurrence of the violation"); H.R. 91-14765, § 617, at 19 (1969) (providing for claims brought "within two years from the date of the occurrence of the violation"). Because these provisions were amended in conference not only to add the misrepresentation exception, but also to require generally that claims be brought "within two years from the date *on which liability arises*," 15 U.S.C. § 1681p (emphasis added); *see also* H.R. Rep. No. 91-1587, at 22, 30 (noting change), respondent argues that Section 618 was changed from a "statute of repose" running upon the occurrence of a violation to a statute of limitations containing a discovery exception. *See* Resp. Cert. Opp. at 20-22. This argument has no merit.

If Congress had meant the last-minute amendments to Section 618 to transform the Act's statute of limitations from a strict two-year period running from the violation of the Act to one generally running from discovery of injury or some other fact, some discussion of the transformation would be expected. The bill that became the FCRA was drafted with the concerns of the credit reporting industry in mind. *See, e.g.*, Arthur R. Miller, *The Assault on Privacy*, 86 (1971) (claiming that the FCRA was "butchered" by "[i]ndustry lobbyists and bank-oriented senators" in committee); *see also* Max A. Denney, *Federal Fair Credit Reporting Act*, 88 Banking L.J. 579, 583-84 (1971) (describing how industry lobbyists were involved in revising the Act). Moreover, industry officials had complained of the House's proposal to expand the limitations period to five years because the two-year period better reflected existing record keeping practices, *see House Hearings* 145, 464, 614, and they were supported on this point by the President. *See id.* at 555.[14] There is, however, no discussion in the legislative history of the incorporation of the general discovery rule or even a mention of the change in language that respondent finds so momentous. Instead, the conference report and the statements on the floor focus upon the addition of the limited discovery provision in the misrepresentation exception. *See* H.R. Rep. No. 91-1587, at 30; 116 Cong. Rec. 36573 (statement of Rep. Sullivan); 116 Cong. Rec. 35940 (statement of Sen. Proxmire).

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[14] Citing to a statement on the House floor, respondent claims that the Nixon administration publicly supported the five-year limitations period proposed in the House bill. *See* Resp. Cert. Opp. at 21 (citing 116 Cong. Rec. 36576 (1970)). In fact, however, in the passage cited, the sponsor of that bill simply stated that Virginia Knauer, the special assistant to President Nixon for consumer affairs, testified on behalf of the administration and supported the bill, not that she supported the limitations period. *See* 116 Cong. Rec. 36576 (statement of Rep. Sullivan). Moreover, in that testimony, Ms. Knauer clearly stated that she "agree[d] . . . with S. 823, in the provision for a 2-year statute of limitations" because "[t]wo years seems ample time within which consumers can bring their suits without placing too great a recordkeeping burden on the credit reporting agencies." *House Hearings* 555.

Nor does the distinction between statutes of limitations and statutes of repose help respondent. In the first place, respondent reads too much into the concept of a statute of repose. Many definitions of the concept have been suggested, including one which is "synonymous with statute of limitations." I Corman, *Limitation of Actions* § 1.3.2.1, at 30 (1991); *see also Kubrick*, 444 U.S. at 117 (noting that statutes of limitations are "statutes of repose"); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 334 (1978) (noting that the Clayton Act's limitations provision "is a statute of repose"); *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 611 (7th Cir. 1975) ("It is this interest in finality which underlies the description of a limitations act as a 'statute of repose.'"). Even more importantly, respondent's assumption that statutes of limitations, by definition, incorporate the discovery rule, is incorrect. As demonstrated above, statutes of limitations can, and traditionally do, run without regard to discovery. *See supra* pp. 14-15. Thus, even the legislative history cited by respondent undermines, rather than supports, her claims.

C. Congress Ratified the Case Law Rejecting a General Discovery Rule When It Revised the Act in 1996.

Congress' subsequent treatment of the FCRA also belies respondent's claim that Congress intended to incorporate the general discovery rule into Section 618. In 1996, Congress enacted the Consumer Credit Reform Act, Pub. L. No. 104-208, § 2401 *et seq.*, 110 Stat. 3009-396 to 462, which "revised nearly every section of the FCRA," Ogburn, *Fair Credit Reporting Act* 37, including the Act's civil liability provisions. *See* Pub. L. No. 104-208, § 2412, 100 Stat. 3009-446. In so doing, however, Congress did not amend Section 618. This omission is significant because at the time every court of appeals to consider the question had rejected the suggestion that Section 618 implicitly incorporates the general discovery rule. *See supra* p. 12 n.4. Congress is presumed to be aware of settled judicial interpretation of a statute's language when it reenacts or amends a statute and to adopt that interpretation when it does not change that language. *See, e.g.*, *Lindahl v. OPM*, 470 U.S. 768, 782 (1985); *see also Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law . . . ."). The same presumption should apply where, as here, Congress extensively revises a statute but does not alter sections with a settled meaning. Thus, the 1996 amendments to the Act undermine, rather than support, the claim that Section 618 contains an implied exception for the general discovery rule.

IV. THE PRESUMPTION APPLIED BY THE NINTH CIRCUIT DOES NOT SAVE THE DECISION BELOW.

In holding that the Act incorporates a general discovery rule, the Ninth Circuit did not rely upon the text of Section 618, the structure of the Act, or its legislative history. Indeed, the Ninth Circuit did not even find that Congress intended to imply the discovery rule to the Act. Instead, the Ninth Circuit held that, under the decisions of this Court, the discovery rule applies to all federal statutes of limitations "unless Congress has expressly legislated otherwise." Pet. App. 6a. This was clear error. This Court has never recognized such a presumption in favor of the discovery rule. Moreover, the text of Section 618, the overall structure of the Act, and its legislative history easily rebut any such presumption.

This Court has never clearly recognized that express statutes of limitations such as Section 618 presumptively incorporate the discovery rule. While this Court has twice stated that "federal courts generally apply a discovery accrual rule when a statute is silent on the issue," *Rotella v. Wood*, 528 U.S. 549, 555 (2000); *accord Klehr*, 521 U.S. at 191, it has done so only in cases involving the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, which does not contain any statute of limitations and is therefore entirely silent on the question of when any limitations period begins. *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 146 (1987). Moreover, while the Court specifically rejected expansive versions of the discovery rule in those cases (requiring discovery of predicate acts and patterns of racketeering as well as injury), it refrained from ruling whether RICO incorporates an injury discovery rule. *See Rotella*, 528 U.S. at 551-54 n.2; *see also Klehr*, 521 U.S. at 198 (concurring in part and concurring in the judgment) (advocating an injury occurrence rule). Furthermore, less than five years ago, this Court indicated that the "standard rule" is that "the limitations period commences when the plaintiff has a 'complete and present cause of action.'" *Bay Area Laundry*, 522 U.S. at 201 (quotation omitted); *see also Kubrick*, 444 U.S. at 120 (noting the general rule that "a tort claim accrues at the time of the plaintiffs' injury"). Thus, it is far from clear whether this Court has embraced any presumption that express statutes of limitations impliedly incorporate the discovery rule.

There are good reasons to reject such a presumption. First, there is no reason to think that Congress expected the discovery rule to be applied to the hundreds of statutes of limitations it has enacted through the years. The normal presumption is that Congress is aware of traditional legal principles and incorporates them unless a contrary statutory intent is evidenced. *See, e.g.*, *United States v. Texas*, 507 U.S. at 334; *Isbrandtsen Co.*, 343 U.S. at 783. Since the discovery rule is not the traditional rule especially for claims analogous to those under the FCRA, *see supra* p. 15, it is unlikely that Congress intended a newer rule of uncertain scope and application to apply absent express language otherwise. Indeed, the dozens of statutes Congress has enacted with explicit discovery provisions (*see supra* pp. 17-18 nn. 8-10) suggest just the opposite.

Second, while the discovery rule has the obvious virtue of protecting plaintiffs who are "blamelessly ignoran[t]" and who therefore cannot be faulted for failing to file their claims diligently, *Urie*, 337 U.S. at 170, application of the rule interferes with other important policies. As noted above, by extending the period in which claims can be brought for an uncertain and indefinite period of time, the discovery rule undermines the defendant's interest in repose and the interests of the defendant and the public in avoiding litigation of stale claims. *See supra* pp. 29-31. In addition, by raising questions concerning when claims were or should have been discovered, the rule imposes increased transaction costs upon the courts and the parties. As there is no reason to think that these additional costs will be outweighed by the benefits of the discovery rule in all or even most cases, there is no justification for imposing a presumption that upsets Congress' expectations.

Third, the stringent presumption applied by the Ninth Circuit—presuming that the discovery rule applies in the absence of an express statement otherwise—is clearly unjustified. For one thing, this presumption contradicts this Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, which was rendered just a year after the FCRA was enacted. In that case, this Court considered the statute of limitations in Section 4B of the Clayton Act, which bars certain claims "unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. Though Section 4B does not expressly reject the discovery rule, this Court nonetheless held that under that provision "a cause of action accrues and the statute begins to run when a defendant commits an act that injures the plaintiff's business." *Zenith*, 401 U.S. at 338. Moreover, while the Court did not explicitly consider the discovery rule in *Zenith*, this Court has recently contrasted the commencement rule adopted in *Zenith* with the discovery rule. *See Rotella*, 528 U.S. 553-54 & n.2; *Klehr*, 521 U.S. at 198 (Scalia, J., concurring in part and concurring in judgment). Thus, *Zenith* cannot be reconciled with the stringent presumption applied by the Ninth Circuit below.

In addition, to the extent that the Ninth Circuit imposed a clear-statement requirement, it was clearly unjustified in doing so. Clear-statement requirements are drastic medicine. Because such requirements "operate less to reveal *actual* congressional intent than to shield important values from an *insufficiently strong* legislative intent to displace them," *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 262 (1991) (Marshall, J., dissenting), they intrude upon Congress' legislative authority and are therefore justified only to protect "independent values of . . . magnitude and constancy" such as federalism and separation of powers concerns. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108-09 (1991); *see generally* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992). Statutes of limitations, however, involve a balancing of competing interests, and judgments concerning their length and operation are therefore "quintessentially the kind of judgment to be made by a legislature." *Malley-Duff*, 483 U.S. at 143 (Scalia, J., concurring); *see also Mills v. Habluetzel*, 456 U.S. 91, 101 n.9 (1982) (noting that statutes of limitations are "best left to legislative determination" and generally legislatures are "free to set periods of limitation without fear of violating some provision of the Constitution"). Thus, a clear-statement requirement in favor of a discovery rule would intrude upon the legislative arena in an area in which courts are least competent do so.

Nor does the authority that the Ninth Circuit cited suggest otherwise. The Ninth Circuit cited this Court's decisions in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), and *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), in supposed support of its presumption that statutes of limitations incorporate the discovery rule. *See* Pet. App. 6a. Those decisions, however, applied an equitable principle developed in fraud cases: namely, that "where the party injured by fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered.'" *Lampf*, 501 U.S. at 363 (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1874)); *see also Holmberg*, 327 U.S. at 397 (quoting same passage from *Bailey*). This narrow principle cannot be mechanically expanded into an across-the-board rule governing all cases. Indeed, as this Court has recognized, the great virtue of this "equitable tolling" doctrine "lies in the very nature of such tolling as the exception, not the rule." *Rotella*, 528 U.S. at 561.

Even more fundamentally, while this Court has long recognized a presumption that statutes of limitations are subject to equitable tolling, *see, e.g.*, *Irwin*, 498 U.S. at 95-96; *Honda v. Clark*, 386 U.S. 484, 501 (1967), it has not required an express rejection of tolling in order to rebut that presumption. To the contrary, it has sought to discern Congress' intent by examining not only the text of a statute of limitations but the structure and policies of the overall legislation as well. *See, e.g.*, *Bennett v. New York Cent. R.R. Co.*, 380 U.S. 424, 426-27 (1965). Thus, in order to overcome the presumption in favor of equitable tolling, this Court has required only that there be "good reason to believe that Congress did not want the equitable tolling doctrine to apply." *Brockamp*, 519 U.S. at 350; *see also Beggerly*, 524 U.S. at 48 (noting that "[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute"). Accordingly, in direct contrast to the decision below, this Court has repeatedly held equitable tolling inapplicable based upon the congressional intent *implicit* in a statute of limitations. *See, e.g.*, *Beggerly*, 524 U.S. at 48-49; *Brockamp*, 519 U.S. at 350-53; *Lampf*, 501 U.S. at 363.

In any event, the Act precludes application of the general discovery rule under any presumption or clear-statement requirement. As shown above, *see supra* pp. 14-20, the plain language of Section 618 provides that the limitations period begins when "liability arises," 15 U.S.C. § 1681p, not upon discovery of injury or some other fact, and the limited discovery provision in the misrepresentation exception prevents implication of an unstated general discovery rule into the section. *See supra* pp. 20-25. In addition, the legislative history shows that Congress rejected a proposal for a general discovery rule, *see supra* pp. 36-37, and such a rule is incompatible with the overall structure of the Act, *see supra* pp. 25-35

Thus, there is more than "good reason" to think that Congress did not want a general discovery rule to apply to the Act. Indeed, even if the discovery rule were subject to a clear-statement requirement as the Ninth Circuit appeared to suggest, the text and structure of the Act would satisfy that requirement because even a clear-statement requirement is not a license to press statutory construction to the "point of disingenuous evasion" or otherwise ignore the terms of a statute. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 57 n.9 (1996) (quotation omitted). Even where a clear-statement rule applies, there must be some plausible construction of the language of the statute to support a construction adopted under the rule. *See, e.g.*, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (1985); *see also Salinas v. United States*, 522 U.S. 52, 60 (1997) (noting that a plain-statement requirement "does not warrant a departure from the statute's terms"). As the Ninth Circuit did not—and could not—offer such a construction, whatever presumption there may be in favor of such a rule, the general discovery rule cannot be implied into Section 618 of the FCRA.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Ninth Circuit should reversed.

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IN THE
Supreme Court of the United States

TRW, INC.,

Petitioner,

v.

ADELAIDE ANDREWS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, when construing the start of the two-year limitations period in 15 U.S.C. § 1681p, "liability arises" immediately when the defendant violates its statutory duty, or instead when the plaintiff later suffers – or discovers – actual injury.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Cited Authorities v

Statutes Involved 1

Statement of the Case 1

Summary of Argument 10

Argument 12

- I. Andrews' Initial Discovery of Her Injuries Should Trigger the Accrual of Her FCRA Claims. 12
  - A. FCRA Liability "Arises" Only When It Springs Up, Comes into Notice, or Presents Itself to the Consumer. 12
  - B. The "Injury Discovery" Accrual Rule is Firmly Rooted in the Universal Maxim That No Prescription Shall Run Against One Who Cannot Bring an Action. . . . 13
  - C. As Early as 1949, this Court Articulated and Applied the "Injury Discovery" Accrual Rule While Construing a Federal Statute of Limitations. 15
  - D. This Court Has Articulated and Applied the "Injury Discovery" Accrual Rule to Various Types of Injuries – Individual and Corporate, Bodily and Otherwise. 18

Page

- II. At the Earliest, Section 618's Limitations Period Starts Running Only when "Liability Exists," Which Requires the Coalescence of All Elements of Liability, Including "Actual Damages." 22
  - A. Even if One Assumes Arguendo That the "Injury Discovery" Accrual Rule Cannot or Should Not Apply, Liability "Exists" Under FCRA's Negligence Provision Only if and When One Suffers "Actual Damages." 22
  - B. Specific Textual Changes Made When Congress Drafted Section 618 Indicate That Its Limitations Period Does Not Start Running Merely Upon the Violation of a Statutory Duty. 26
- III. Section 618 Contains an Additive Estoppel Exception, Which Operates Only in Rare, Egregious Cases To Extend – But Not To Truncate – FCRA's Primary Limitations Period. 30
  - A. Applying a Discovery Accrual Rule to Section 618's Primary Provision Does Not Render Its Misrepresentation Exception "Superfluous." 31
    - 1. Operation of the Injury Discovery Accrual Rule in Section 618's Primary Provision. 32
    - 2. Separate Operation of the Misrepresentation Exception. 32

Page

B. *Houghton v. Insurance Crime Prevention Inst.* and Its Progeny Misapplied the Doctrine of *Expressio Unius Est Exclusio Alterius*, Thereby Erroneously Truncating Section 618's Limitations Period. 34

IV. All Related FCRA Provisions Support Application of the "Injury Discovery" Accrual Rule to Section 618. 40

V. Sound Policy Supports Application of the Injury Discovery Rule to Section 618. 44

Conclusion 47

TABLE OF CITED AUTHORITIES

Page

Cases:

Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036 (10th Cir. 1980)	36
American Tobacco Co. v. People's Tobacco Co., 204 F. 58 (5th Cir. 1913)	18
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Bailey v. Glover, 88 U.S. (21 Wall) 342 (1874)	14, 25
Beach v. Ocwen Fed. Bank, 523 U.S. 410 (1998)	28
Bergman v. U.S., 751 F.2d 314 (10th Cir. 1984), *cert. denied*, 474 U.S. 945 (1985)	39
Bluefields S.S. Co. v. United Fruit Co., 243 F. 1 (3d Cir. 1917)	19
Bowyer v. United States Dept. of Air Force, 875 F.2d 632 (7th Cir. 1989)	39
Bradway v. American Nat'l Red Cross, 992 F.2d 298 (11th Cir. 1993)	36
Burnett v. New York Cent. R.R., 380 U.S. 424 (1965)	13, 38
Cada v. Baxter Heathcare Corp., 920 F.2d 446 (7th Cir. 1990)	10, 17, 18, 21, 22, 33, 34, 42
Cigna Ins. Co. v. Oy Saunatec, Ltd., 241 F.3d 1 (1st Cir. 2001)	20
Clark v. State Farm Fire & Cas. Ins. Co., 54 F.3d 669 (10th Cir. 1995)	29, 34, 39
Clay v. Equifax, Inc., 762 F.2d 952 (11th Cir. 1985)	34
Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992)	12, 13

Page

Connors v. Hallmark & Son Coal Co., 935 F.2d 336 (D.C. Cir. 1991) 18
Conroy v. Aniskoff, 507 U.S. 511 (1993) 28, 29
County of Oneida, New York v. Oneida Indian Nation, 470 U.S. 226 (1985) 46
Custis v. United States, 511 U.S. 485 (1994) 35
Englerius v. Veterans Admin., 837 F.2d 895 (9th Cir. 1988) 9, 10, 39
Epstein v. United States, 174 F.2d 754 (6th Cir. 1949) 25
Ferguson v. Roberts, 11 F.3d 696 (7th Cir. 1993) 36
Ford v. United States, 273 U.S. 593 (1927) 35
FTC v. TRW Inc., 784 F. Supp. 361 (N.D. Tex. 1991) 3
Gates Rubber Co. v. USM Corp., 508 F.2d 603 (7th Cir. 1975) 17, 18
Guaranty Trust Co. of New York v. United States, 304 U.S. 126 (1938) 37
Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329 (9th Cir. 1995) 42, 43
Hanger v. Abbott, 73 U.S. (6 Wall) 532 (1867) 13
Hardin v. City Title & Escrow Co., 797 F.2d 1037 (D.C. Cir. 1986) 21
Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) 35
Hinkle by Hinkle v. Henderson, 85 F.3d 298 (7th Cir. 1996) 36
Holmberg v. Armbrecht, 327 U.S. 392 (1946) 14
Houghton v. Insurance Crime Prevention Inst., 795 F.2d 322 (3d Cir. 1986) . . . 8, 9, 31, 32, 34, 37, 39

Page

Hyde v. Hibernia Nat'l Bank, 861 F.2d 446 (5th Cir. 1988), *cert. denied sub nom. Credit Bureau Services – New Orleans v. Hyde*, 491 U.S. 910 (1989) 11, 29
ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270 (1987) 37
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 28
Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990) 21, 22
Jamison v. Encarnacion, 281 U.S. 635 (1930) 10, 23
Jordan v. Medley, 711 F.2d 211 (D.C. Cir. 1983) . . 9
Kates v. Crocker Nat'l Bank, 776 F.2d 1396 (9th Cir. 1985) 23
Klehr v. A. O. Smith Corp., 521 U.S. 179 (1997) 21, 29, 30
Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991) 36, 43, 46
Levy v. Stewart, 78 U.S. (11 Wall) 244 (1870) 14
Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998) 24
Marsh v. Industrial Accident Comm'n, 217 Cal. 338 (1933) 14
Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176 (1971) 30
Old Colony R.R. v. Commissioner, 284 U.S. 552 (1932) 13
Peacock v. Retail Credit Co., 302 F. Supp. 418 (N.D. Ga. 1969) 20
Reiter v. Cooper, 507 U.S. 258 (1993) 24

Rotella v. Wood, 528 U.S. 549 (2000) . . . 14, 17, 18, 23, 30, 35, 38

Rylewicz v. Beaton Serv., Ltd., 888 F.2d 1175 (7th Cir. 1989) . . . 34, 39

Suckow Borax Mines Consol., Inc. v. Borax Consol., Ltd., 185 F.2d 196 (9th Cir. 1950) . . . 19

Tijerina v. Walters, 821 F.2d 789 (D.C. Cir. 1987) . . . 37, 38, 39

2361 State Corp. v. Sealy, Inc., 263 F. Supp. 845 (N.D. Ill. 1967) . . . 19

United States v. Kubrick, 444 U.S. 111 (1979) . . . 15, 16, 17, 18, 21, 25, 34, 43

Urie v. Thompson, 337 U.S. 163 (1949) . . . 15, 18, 20, 21

Willison v. Watkins, 28 U.S. (3 Pet.) 43 (1830) . . . 25

Wolin v. Smith Barney Inc., 83 F.3d 847 (7th Cir. 1996) . . . 15, 25, 34, 42

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) . . . 14, 19, 20, 21, 29

Statutes:

5 U.S.C. § 552a(g)(5) . . . 37, 39

15 U.S.C. § 1640(e) . . . 26

15 U.S.C. § 1679(1) . . . 26

15 U.S.C. § 1681 *et seq.* . . . 1

15 U.S.C. § 1681a . . . 1

15 U.S.C. § 1681b . . . 1

15 U.S.C. § 1681b(a)(3) . . . 43

15 U.S.C. § 1681(a)(4) . . . 45, 46

15 U.S.C. § 1681(b) . . . 46

15 U.S.C. § 1681b(3)(A) . . . 8

15 U.S.C. § 1681c . . . 1

15 U.S.C. § 1681d . . . 1

15 U.S.C. § 1681e . . . 1, 42, 43

15 U.S.C. § 1681e(a) . . . 8

15 U.S.C. § 1681e(b) . . . 9

15 U.S.C. § 1681g . . . 1, 32

15 U.S.C. § 1681g(a) . . . 40

15 U.S.C. § 1681h . . . 1

15 U.S.C. § 1681i . . . 1

15 U.S.C. § 1681j(a)(1)(A) . . . 42

15 U.S.C. § 1681k . . . 1

15 U.S.C. § 1681m . . . 1

15 U.S.C. § 1681m(a) . . . 40, 41

15 U.S.C. § 1681n . . . 1, 25

15 U.S.C. § 1681o . . . 1, 10, 23, 37

15 U.S.C. § 1681p . . . *passim*

15 U.S.C. § 1681q . . . 1

15 U.S.C. § 1681r . . . 1

15 U.S.C. § 1681s . . . 1

15 U.S.C. § 1681s-1 . . . 1

15 U.S.C. § 1681s-2 . . . 1

15 U.S.C. § 1681t . . . 1

15 U.S.C. § 1691e(f) . . . 26

15 U.S.C. § 1692k(b) . . . 26

15 U.S.C. § 1693m(g) . . . 26

Pub. L. No. 91-508, 84 Stat. 1136 (1970) . . . 1

Pub. L. No. 93-579, § 2, 88 Stat. 1896 (1974) . . . 37

Pub. L. No. 104-208, 110 Stat. 3009 (1996) . . . 1

Rule:

Fed. R. Civ. P. 11(b) 43

Fed. R. Civ. P. 61 9

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H.R. 16430, 91st Cong., 116 Cong. Rec. 6200 27

S. 823, 91st Cong., 115 Cong. Rec. 2415 (Jan. 31, 1969) 26

115 Cong. Rec. 33824 (Nov. 12, 1969) 27

116 Cong. Rec. 6200 (Mar. 5, 1970) 27

116 Cong. Rec. 7796 (Mar. 17, 1970) 27

116 Cong. Rec. 32638 (Sept. 18, 1970) 27

116 Cong. Rec. 32641 (Sept. 18, 1970) 27

116 Cong. Rec. 34149 (Sept. 29, 1970) 27

116 Cong. Rec. 35843 (Oct. 8, 1970) 27

116 Cong. Rec. 35943 (Oct. 9, 1970) 28

116 Cong. Rec. 36573 (Oct. 13, 1970) 27

Miscellaneous Authorities:

Absatz 1 Bürgerliches Gesetzbuch § 852 16

50 Am. Jur. 2d, *Libel and Slander* § 390 (1970) .. 20

50 Am. Jur. 2d, *Libel and Slander* § 421 (1995) .. 20

Black's Law Dictionary 914 (6th ed. 1990) 23

Black's Law Dictionary 1411 (6th ed. 1990) 36

I Corman., *Limitations* § 6.5.5.1 14

II Calvin C. Corman., *Limitations of Actions* § 11.1.3 15

II Calvin C. Corman., *Limitations of Actions* § 11.1.4 15

II Calvin C. Corman., *Limitations of Actions* § 11.1.5 15

II Calvin C. Corman., *Limitations of Actions* § 11.2.1 14

II Calvin C. Corman., *Limitations of Actions* § 11.5.4 14

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John Fonblanque, Treatise of Equity 244 (E. Merriam & L. Merriam eds., 4th ed. 1835) ... 25

Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 Geo. L.J. 95 (1983) 23

1 The Oxford English Dictionary 629 (2d. ed. 1989) 13, 22

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STATUTES INVOLVED

The text of certain key statutes, as they were in effect during the time frame relevant to this action (1994 through 1996), were provided to this Court as an appendix to Respondent's Brief in Opposition to Petition. *See* Br. in Opp. to Pet. at 1; *id.*, App. at 1a-9a. Petitioner TRW Inc. ("TRW") included within the Joint Appendix, however, and in its Brief referred to, "portions of the Act, *as amended*...."[1] Brief for Petitioner[] ("Br.") at 2 (emphasis added); J.A. 32-88. Numerous Fair Credit Reporting Act ("FCRA") provisions contained in the Joint Appendix are anachronistic due to their recent amendment. They are: 15 U.S.C. §§ 1681a, 1681b, 1681c, 1681d, 1681e, 1681g, 1681h, 1681i, 1681k, 1681m, 1681n, 1681q, 1681r, 1681s, 1681s-1, 1681s-2, and 1681t. *Compare, e.g.*, the Consumer Credit Reporting Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended at 15 U.S.C. § 1681 *et seq.* (1999)) (providing in Section 2404 that Sept. 30, 1997 is the effective date of various 1996 amendments), *with* PA 3a (Respondent filed her action below on Oct. 21, 1996), *and* FCRA of 1970, Pub. L. No. 91-508, 84 Stat. 1136 (1970) (text of FCRA as first enacted in 1970, when 15 U.S.C. § 1681p was enacted in its current form). Respondent therefore urges caution when referring to the statutes in the Joint Appendix.

STATEMENT OF THE CASE

On May 31, 1995, while attempting to organize her affairs before giving birth to her second child, Respondent Adelaide Andrews' financial world was turned upside down. On that date, she stepped into a "credit reporting" nightmare, when she attempted to refinance her home mortgage, but was humiliatingly unable to do so. Thus began Andrews' initial suffering because of Petitioner TRW Inc.'s failure to abide by the Fair Credit Reporting Act ("FRCA").

---

[1] By apparent mistake, TRW failed to include within the Joint Appendix the text of 15 U.S.C. § 1681o (FCRA Section 617), FCRA's key provision imposing civil liability for negligent noncompliance with the Act. Respondent, in the Appendix to her Brief in Opposition to Petition, provided the text of Section 617 as it was in effect during the time frame relevant to this action. *See* Br. in Opp. to Pet., App. at 9a. The text of Section 617 in its augmented and current form was printed by TRW in the appendix to its Petition. *See* Pet., App. at 79a.

In the weeks that followed, Andrews gradually learned that she was an unwitting victim of "identity theft." On October 21, 1996, well within two years of May 31, 1995 (and after prolonged, exasperating dealings with TRW and others), Andrews filed this action in the district court against TRW and another reporting agency, Trans Union Corporation.

Identity Theft: Since at least 1989, the popular media have reported a growing epidemic of "identity theft," a phrase used to describe a range of insidious acts where fraud perpetrators use portions of innocent consumers' indicia of identity to defraud creditors. *See* ER 344-45.[2] One practical effect of any successful identity theft is that an innocent consumer – the one whose indicia of identity are pilfered – is saddled with the perpetrator's credit delinquencies and other serious problems. *See* Fed. Trade Comm'n, ID Theft: When Bad Things Happen to Your Good Name, Resolving Credit Problems (Feb. 2001), *available at* http://www.ftc.gov/bcp/conline/pubs/credit/ idtheft.htm#credit (last visited May 30, 2001) (self-help information for identity theft victims).

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[2] References to "ER" are to the Excerpts of Record filed in the Ninth Circuit by Andrews (appellant below) on March 26, 1999. References to "SER" are to the Appellee's Supplemental Excerpts of Record filed in the Ninth Circuit by TRW on July 27, 1999. References to "Br." are to TRW's brief on the merits. References to "JA" and "SJA" are to the Joint Appendix and Supplemental Joint Appendix, respectively, which were filed herein (the latter under seal) concurrently with TRW's brief on the merits. References to "PA" are to the appendix to TRW's Pet. for a Writ of Cert. References to "OBA" are to the appendix to Respondent's Brief in Opposition to Petition. References to "Tr." are to the Reporter's Daily Transcript of Proceedings from the August 1998 trial held in the district court below.

Identity theft can have ruinous impacts upon the innocent consumers whose identities are misappropriated. Often, such innocent consumers (1) are routinely denied otherwise well deserved credit, (2) must endure many months or even years of frustrating dealings with hostile credit grantors and bill collectors seeking payment from the wrong person, and (3) must spend substantial time, effort, and often money to determine the scope of the confusion and remedy their plight. *See id.* Apart from the potentially sweeping economic effects of such victimization, the emotional impacts range from great annoyance to profound distress – including depression. *See* ER 351.

Although it is impossible to determine how many of the nation's consumers have fallen victim to identity theft, all indications are that the number has easily reached tens of thousands – if not hundreds of thousands – every year. *See* ER 345-46. Indeed, throughout the early 1990s, TRW was well aware of the explosive epidemic of identity theft. *See* ER 233-38, 264-66, 268 (testimony of former TRW employees and related exhibits). TRW knew for years, for example, that it regularly disclosed "mismatched" or "mixed" personal credit histories (e.g., disclosed the confidential histories of uninvolved, victimized consumers to credit grantors). *See FTC v. TRW Inc.*, 784 F. Supp. 361, 362 (N.D. Tex. 1991) (indicating TRW's failure "to [m]aintain reasonable procedures to prevent the occurrence and reoccurrence of Mixed Files. . . ."). TRW thus knew that its computerized procedures regularly disclosed consumers' confidential credit histories under highly suspicious and inappropriate circumstances. *See* ER 288, 345.

TRW argued in the Ninth Circuit below that FCRA permits any reporting agency to breach an innocent consumer's financial privacy whenever identity theft was afoot. *See* Appellee's Answering Brief, filed July 27, 1999, at 29-32. Essentially, TRW argued that whenever an impostor invoked aspects of another consumer's identity (e.g., supplied the innocent consumer's social security number), the innocent, victimized consumer automatically became sufficiently "involved" in the underlying credit transaction to justify a financial privacy breach. *See id.* at 32-35. Indeed, TRW argued that Congress effectively desired privacy breaches under such circumstances. *See id.* at 33-35. The district court accepted this legal fiction in granting partial summary judgment below. *See* PA 28a n.9 and accompanying text. The court of appeals rejected TRW's argument, however, and hence restored the entirety of Andrews' FCRA privacy claim. *See* PA 6a-8a.

Thus, throughout the 1990s, TRW was operating against the law. Specifically, TRW gave itself false permission to breach the financial privacy of any consumer who was an apparent target of identity theft. All too often, such privacy breaches were *facilitating* identity theft. *See* ER 348-49. Indeed, reporting agencies' improper disclosures of creditworthy consumers' credit histories are the *sine qua non* of identity theft. But for uncritical privacy breaches by reporting agencies like TRW, identity thieves would have no reason to invoke victimized, creditworthy consumers' identifying information. Invoking such indicia would do the thieves no good; they could not benefit from other consumers' worthy credit histories if reporting agencies were vigilant about withholding such information.

TRW's Breaches of Duty Concerning Andrews: On June 17, 1993, Andrews visited a radiologist's office. Upon arrival, Andrews complied with a request to complete a "Patient Information" form. *See* SJA 46 (completed form). As is typical, the form sought, *inter alia*, Andrews' name, address, date of birth, and social security number, all of which she provided. *See id.* Unbeknownst to Respondent *Adelaide* Andrews, however, the radiologist's receptionist was named *Andrea* Andrews, only by coincidence. *See* SER 909-10. Eventually, *Andrea* Andrews (the receptionist and hereinafter the "Impostor") pilfered Respondent *Adelaide* Andrews' social security number and used it as her own in various commercial transactions, including repeated attempts to obtain credit. *See* ER 121 (Andrews' diary entry upon discovering the Impostor's identity).

In connection with the Impostor's known dealings, TRW allegedly violated certain FCRA statutory duties four times within a six-month period between July 1994 and January 1995. Specifically, TRW disclosed Andrews' confidential credit history to four different paying subscribers who were dealing with the Impostor – including a bank (on July 25, 1994), a cable television company (on September 27, 1994), a department store (on October 28, 1994), and a retail lender (on January 3, 1995). *See* SJA 47-62, 74-75. In connection with each of these privacy breaches, TRW was responding to a credit application submitted to the subscriber by the Impostor, who primarily used her own indicia of identity, but invoked Andrews' social security number. *See, e.g.*, SJA 50 (printout of October 28, 1994 TRW credit disclosure implicating Andrews, reflecting the credit applicant's proffered indicia of identity).

For example, on September 27, 1994, the Impostor applied for a cable television account from Prime Cable of Las Vegas. *See* ER 177. On the Prime Cable credit application, the Impostor used her own identifying information (her own name, her Las Vegas address, etc.), but provided Andrews' misappropriated social security number. *See id.* When Prime Cable purchased from TRW a consumer report concerning the application, TRW disclosed Andrews' confidential financial history, thus facilitating Prime Cable's extension of credit to the Impostor. *See* SJA 75 (TRW's record of disclosing Andrews' confidential credit history). The Impostor apparently paid the charges incurred on this Prime Cable account for a number of months, but then let the account fall delinquent. *See* ER 178-79 (account history from December 8, 1994 to February 25, 1995). By the time Andrews first realized her own consumer reporting problems on May 31, 1995, the Impostor's Prime Cable credit account had been turned over to credit collection agents, who thereafter pursued Andrews for payment. *See* ER 076-83.[3]

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[3] TRW persistently implies that Prime Cable advanced no credit to the Impostor pursuant to a TRW privacy breach. *See, e.g.*, Pet. at 5

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Andrews' Discovery and Accompanying Onset of Actual Damages: All was ostensibly well with Andrews until she attempted to refinance her home on May 31, 1995. While meeting with the loan officer in the lending institution on that date, the loan officer obtained an amalgamated consumer report concerning Andrews from another reporting agency (i.e., one consolidating information from several other reporting agencies, including TRW). *See* SER 952-53. Upon reviewing this report, the loan officer told Andrews that she could not refinance her home mortgage because of indications of recent negative credit dealings, which Andrews later learned were based on the Impostor's activities. *See* ER 098-99, 146. So shocked and humiliated by the allegation that she was neither creditworthy nor truthful about her financial dealings, Andrews began to cry at the lending institution. *See* ER 099, 173-74. Later that day, as Andrews tried to rectify the credit reporting problem immediately, she was urged to contact the TRW, Trans Union Corporation, and Equifax Credit Information Services, Inc. (then the three largest consumer reporting agencies) to correct any possible misinformation reflected in their consumer reports. Tr. at 179 (Andrews' trial testimony on August 4, 1998).

Acting on this advice, Andrews immediately contacted all three agencies, and obtained a consumer file disclosure from each. *See, e.g.*, ER 133 (reflecting Andrews' contacting TRW). When she received from TRW its file disclosure, she noted numerous discrepancies and problematic details, including cryptic, unexplained references to inquiries from the four subscribers described above. *See* SJA 68-80. Andrews promptly informed TRW about these discrepancies, and TRW purported to set about eliminating them. *See* SJA 81.

Unfortunately, however, Andrews was vexed throughout the next year by resurgent problems springing from TRW's and Trans Union Corporation's lax consumer reporting procedures. *See* ER 110-12, 121-22, 137-41. For example, Andrews was hounded by attempts to collect from her on the Impostor's Prime Cable account, which TRW had earlier facilitated. *See* ER 076-83. Andrews was also repeatedly confronted with resurgent misinformation contained in TRW's subsequent consumer reports, which were generated when, for example, Andrews sought credit while changing her place of residence later in 1995 and again in 1996. *See, e.g.*, ER 112-14, 152-53 (diary entries and discovery responses).

Andrews eventually came to realize that, when the reporting agencies' lax procedures violated their duty of care concerning her privacy, the reporting agencies actually facilitated the Impostor's identity theft, which eventually harmed her. *See* ER 108, 113, 122. This realization – and the sustained anger and worry that Andrews experienced because of TRW's repeated privacy breaches – compounded the mental anguish that Andrews first began suffering on May 31, 1995. *See* ER 137-41. Indeed, Andrews' rheumatologist testified to his medical opinion that the stress from Andrews' longstanding frustration with TRW, specifically, seriously exacerbated her pre-existing, chronic medical condition. *See* Tr. at 829-31 (August 8, 1998 trial testimony of Dr. Roy Kaplan).[4]

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(omitting reference to Prime Cable); Br. at 5-6 (arguing that Prime Cable, as a regulated utility, was *required* to provide cable service to the Impostor). As a regulated utility, however, Prime Cable could have exacted a large, up-front cash deposit from any non-creditworthy consumer, but elected not to do so here after receiving the Impostor's permission to obtain, and then obtaining, a TRW credit report. *See* SER 1051 (under Nevada law, a "reasonable advance deposit . . . may be required"); *see also* ER 177 (noting the Impostor's consent to a TRW credit check).

[4] Of the four times that TRW breached Andrews' privacy in violation of its FCRA duties, three did not end in any credit issuance to the Impostor. *See* SJA 47-48, 50-51, 59 (indicating business reasons why credit was denied in each instance). TRW tries to present its privacy violations as therefore inherently innocuous. This argument fails by overlooking, among other matters, the mental anguish that one can suffer upon learning of serial privacy breaches.

The Litigation Below: On October 21, 1996, after more than a year of frustrating dealings with TRW, Trans Union Corporation, creditors, collection agents, and others, Andrews filed suit against TRW and Trans Union in the District Court for the Central District of California. *See* JA 8-20. Concerning TRW's four privacy breaches, Andrews claimed that TRW had violated its statutory duties as set forth in 15 U.S.C. § 1681b(3)(A) and the first and last sentences of 15 U.S.C. § 1681e(a). *See* JA 15-16. Together, these statutes require reporting agencies to follow reasonable procedures, and also to possess reasonably clear factual justification, when disclosing consumers' confidential credit histories. *Cf.* Appellant's Reply Brief, filed September 10, 1999, at 12-18 (explaining FCRA's privacy protections).

On February 23, 1998, TRW moved for partial summary judgment on various aspects of Andrews' claims. *See* SER 793-823. As to the specific question presented here, TRW moved for partial summary judgment on statute of limitations grounds regarding the portion of Andrews' claims arising from TRW's first two privacy breaches (those which occurred slightly more than two years before this action commenced). *See* SER 808-10. Andrews opposed. *See* SER 977-1018; *see also* SER 992-97 (Andrews' argument specifically regarding the statute of limitations issue). The district court granted TRW partial summary judgment as requested, striking Andrews' breach of privacy claims entirely, based on both statute of limitations grounds and the plainly erroneous holding that Andrews was sufficiently "involved" in the Impostor's credit dealings. *See* Pet., App. at 21a-34a. In so doing, the district court invoked, *inter alia*, *Houghton v. Insurance Crime Prevention Inst.*, 795 F.2d 322 (3d Cir. 1986), as grounds for its statute of limitations ruling. *See* Pet., App. at 23a.

Following the district court's partial summary judgment rulings, TRW's co-defendant Trans Union Corporation settled with Andrews. *See* Notice of Settlement (filed July 16, 1998). Andrews then proceeded to trial against TRW with her remaining, orphaned claim for violation of 15 U.S.C. § 1681e(b), which pertained to the inaccuracy of the TRW consumer reports initiated by Andrews on and after May 31, 1995. Following another series of erroneous pre-trial evidentiary rulings concerning the scope of allowable expert testimony, the remaining inaccuracy claim was tried to a jury, which held for TRW. *See* Judgment on the Verdict (filed August 17, 1998).

Andrews appealed to the court of appeals concerning the statute of limitations ruling, as well as many others. *See* Opening Brief of Appellant at 2-3 (filed March 26, 1999) (listing seven issues presented on appeal); *see also id.* at 49-57 (Andrews' opening limitations argument). The court of appeals reversed the district court's judgment in favor of Andrews on the statute of limitations issue and all but one other issue.[5] *See* PA 9a. In so doing, the court of appeals restored not only the entirety of Andrews' privacy claim, but also her claim for punitive damages based thereon. *See* PA 8a; *see also* SJA 56 (cryptic evidence of TRW's advance consciousness of its privacy violation).

Relevant to the question presented here, the court of appeals below declined to follow *Houghton v. Insurance Crime Prevention Institute* and its ilk, and instead followed by analogy *Englerius v. Veterans Admin.*, 837 F.2d 895 (9th Cir. 1988).

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[5] On appeal, the Ninth Circuit ruled that the district court's erroneous rulings made in partial summary judgment had further "infected" the district court's pre-trial rulings and led to additional errors concerning the admissibility of certain critical trial testimony. *See* PA 8a-9a. Unfortunately, the Ninth Circuit then deemed all such pre-trial and trial errors "harmless" as they related to the remnant "accuracy" claim, and declined to reverse the district court's judgment based thereon. *See* Pet., App. at 9a. Andrews acquiesces to this aspect of the Ninth Circuit's ruling, although she views it as erroneous under Fed. R. Civ. P. 61. *See, e.g.*, *Jordan v. Medley*, 711 F.2d 211, 219 (D.C. Cir. 1983) (Scalia, J.) (analyzing Fed. R. Civ. P. 61, and finding no *necessary assurance* that jury's judgment was not substantially swayed by error). *See generally* Appellant's Petition for Rehearing by Panel or En Banc (filed July 28, 2000) (Andrews' argument below about the harm from the district court's pre-trial and trial errors).

See PA 6a (citing *Englerius*, 837 F.2d at 898). Thereupon, the Ninth Circuit held that Andrews' claims concerning TRW's four separate privacy breaches were not barred by the statute of limitations, and remanded the claims for trial. *See id.* ("Andrews' claims were not barred.").

SUMMARY OF ARGUMENT

When construing FCRA's statute of limitations, 15 U.S.C. § 1681p (hereinafter "Section 618"), this Court should choose one of two reasonable constructions. Under either one, Andrews' privacy claims should go forward *in toto*.

First, this Court may – and Andrews respectfully submits should – apply the traditional "injury discovery" accrual rule, which is generally applied by the federal courts. The "injury discovery" accrual rule "postpones the beginning of the limitations period" until a plaintiff actually or constructively "discovers that he has been injured." *Cada v. Baxter Heathcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990). Section 618's plain language literally expresses such an accrual rule. Specifically, Section 618 provides that FCRA's two-year limitations period starts running when liability "arises." Liability "arises" only when injury is *suffered*. *See, e.g., Jamison v. Encarnacion*, 281 U.S. 635, 641 (1930) ("[L]iability arises [only] when one *suffers injury* as a result of any breach of duty owed to him by another. . . ." (emphasis added)). Moreover, since 1949, this Court has consistently articulated and applied the "injury discovery" accrual rule in a variety of contexts, whether the injuries were individual or corporate, bodily or not. Given the "injury discovery" accrual rule's fundamental fairness, this Court should affirm its applicability to all amenable federal limitations provisions – including Section 618.

Second, this Court might instead choose to apply a relatively restrictive "injury occurrence" accrual rule here. If so, the "injury" that must occur for the limitations period to start running is one constituting *actual damages*. *See* 15 U.S.C. § 1681o (providing that actual damages are the *sine qua non* of liability for negligent noncompliance with FCRA). Therefore, at an absolute minimum, Section 618 requires an "actual injury occurrence" accrual rule, which contrasts sharply with TRW's recommended "violation occurrence" accrual rule. *See Hyde v. Hibernia Nat'l Bank*, 861 F.2d 446, 448-49 (5th Cir. 1988) (applying an "actual injury occurrence" rule to Section 618, and expressly rejecting defendant's recommended "violation occurrence" accrual rule), *cert. denied sub nom. Credit Bureau Services – New Orleans v. Hyde*, 491 U.S. 910 (1989).

Here, wholly apart from questions about discovery, Andrews incurred no actual injury until May 31, 1995, when she first became embroiled in her credit reporting ordeal. Because Andrews filed suit in October 1996, she brought this action well within the two-year limitations period. Accordingly, even if this Court were to apply a relatively restrictive and less traditional "injury occurrence" accrual rule here, it should nonetheless affirm the Ninth Circuit's judgment below.

Section 618's history reveals that Congress deliberately rejected TRW's recommended "violation occurrence" accrual rule. When enacting FCRA, Congress drafted, deliberated, and then *discarded* plain language that would have commenced the limitations period immediately upon a potential defendant's behind-the-scenes "violation" of FCRA duties. In so doing, Congress made ample room for judicial application of the "injury discovery" accrual rule, or, at minimum, an "actual injury occurrence" accrual rule.

Congress also affixed a special "misrepresentation exception" to Section 618's primary provision. This exception applies only to a particularly egregious type of misconduct, where a potential defendant reporting agency willfully misrepresents to a consumer either facts or its legal obligations concerning its extant FCRA liability. In such instances, the special exception operates to *extend* the limitations period indefinitely until the falsity of the willful misrepresentation is revealed. Therefore, this special exception provisionally adds to the time within which a diligent consumer may bring suit *after accrual*. The special exception thus comports with and complements any relevant accrual rule, be it the generally accepted "injury discovery" or the more restrictive "actual injury occurrence" accrual rule.

FCRA's related "notice and access" provisions similarly comport with the application here of either an "injury discovery" or an "actual injury occurrence" accrual rule. As important as those related provisions are, they fail to provide a potential FCRA plaintiff with sufficient information upon which to base a FCRA lawsuit. FCRA does not impose strict liability. As a result, any potential FCRA plaintiff might need the full two-year limitations period *after* injury arises to investigate the merits of a potential lawsuit.

Sound policy considerations support the conclusion that Section 618's limitations period should start no sooner than when a potential plaintiff discovers an injury, or reasonably should have done so. This Court should readily dismiss TRW's intimation that reading an "injury discovery" accrual rule within Section 618 would expose defendants to tardy litigation for decades. FCRA's limited consumer "notice and access" provisions, when coupled with the "injury discovery" accrual rule, will provide very swift closure in almost all cases. While it may be sound policy to establish an exact limit to how long after a defendant's statutory violation a plaintiff may bring a FCRA action, such is for Congress to decide.

ARGUMENT

I. ANDREWS' INITIAL DISCOVERY OF HER INJURIES SHOULD TRIGGER THE ACCRUAL OF HER FCRA CLAIMS.

A. FCRA Liability "Arises" Only When It Springs Up, Comes into Notice, or Presents Itself to the Consumer.

Statutory interpretation begins with the statutory language itself. *See, e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). When interpreting and applying a statute of limitations, one "must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of rights given by the Act." *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 427 (1965). Section 618's primary provision reads: "An action to enforce liability created under [FCRA] may be brought . . . within two years of the date on which the liability arises. . . ." Therefore, this Court must first address the question: "Exactly when does liability 'arise' under FCRA?"

The term "arises" commonly refers to a "springing up," "coming into notice," or presentation – hence, a *manifestation*. *See* 1 The Oxford English Dictionary 629 (2d. ed. 1989) (defining "arise" as "to spring up, come into . . . notice, 'come up,' present itself"). Applying this common meaning of "arises" to Section 618, the statute literally expresses a discovery accrual rule. *See, e.g., Old Colony R.R. v. Commissioner*, 284 U.S. 552, 560 (1932) (holding Congress presumptively uses words in their known and ordinary sense). Indeed, from Andrews' point of view, not one element of TRW's alleged liability sprang up, came into notice, came up, or presented itself before May 31, 1995, when she first discovered any credit problem. Accordingly, this Court need do no more than apply an appropriately common definition to the term "arises" to affirm the judgment below. As shown below, this definition and the result that it achieves comport with both legal tradition and this Court's specific precedents.

B. The "Injury Discovery" Accrual Rule is Firmly Rooted in the Universal Maxim That No Prescription Shall Run Against One Who Cannot Bring an Action.

Putting aside unusually harsh statutes of limitations which are expressly keyed to defendants' wrongful acts (regardless of how belatedly or latently harmful), courts have generally recognized that plaintiffs' rights and remedies co-exist. *See, e.g., Hanger v. Abbott*, 73 U.S. (6 Wall) 532, 542 (1867)

("Peace restores the right and the remedy, and . . . that cannot be if the limitation continues to run during the period the [plaintiff] is rendered incapable to sue. . . ."). Accordingly, this Court has long ago acknowledged as a "maxim of universal justice" that "*contra non valentem agere non currit prescriptio*" – i.e., no prescription runs against one who is unable to bring an action. *See Levy v. Stewart*, 78 U.S. (11 Wall) 244, 254 (1870) (acknowledging and applying maxim).

This Court has also recognized the distinct principle that no plaintiff may bring suit *before* first being presented with actionable damages. *See, e.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971) ("[T]he cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them. . . ."). By considering these two principles together, one can easily see the harshness and unreasonableness of eroding a brief limitations period before any action could possibly be brought. Accordingly, courts have increasingly recognized the "injury discovery" accrual rule, particularly over the last century. *See, e.g.*, *Marsh v. Industrial Accident Comm'n*, 217 Cal. 338, 345-51 (1933) (discussing and following various states' earlier adoption of the "injury discovery" accrual rule in the context of workers' compensation).[6]

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[6] As *Marsh* and the cases cited in it show, commentators who claim that the "injury discovery" accrual rule first developed in the 1950s are mistaken. TRW and various courts, including this Court in *Rotella v. Wood*, have cited to such a commentator, Professor Corman. *See Rotella v. Wood*, 528 U.S. 549, 555 (2000) (citing I Corman, *Limitations* § 6.5.5.1); Br. at 13-15, 24, 39 (citing, e.g., II Calvin C. Corman., *Limitations of Actions* § 11.2.1, at 136-39). Professor Corman's treatise contains various errors and inaccuracies. For example, Corman writes that this Court's opinion in *Bailey v. Glover*, 88 U.S. (21 Wall) 342 (1874) (a landmark case concerning equitable discovery principles) was decided a century later, in 1974, and specifically following this Court's opinion in *Holmberg v. Armbrecht*, 327 U.S. 392 (1946). *See* II Corman, *Limitations*, § 11.5.4. Similarly,

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C. As Early as 1949, This Court Articulated and Applied the "Injury Discovery" Accrual Rule While Construing a Federal Statute of Limitations.

This Court first clearly articulated and applied the "injury discovery" accrual rule in *Urie v. Thompson*, 337 U.S. 163 (1949). There, in the context of workers' compensation, this Court reasoned that the plaintiff could not be expected to have acted upon what was "unknown and inherently unknowable" and "had not yet obtruded on his consciousness." *Id.* at 169. Emphasizing that the plaintiff had been "blamelessly ignorant" of his injury, this Court concluded that his claim did not accrue until the injury came into notice, or presented itself. *See id.* at 170. Specifically, this Court stated that commencing the statute of limitations before the injury's presentation could not "be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time *after notice* of the invasion of legal rights." *Id.* (emphasis added). Thus, the plaintiff "can be held to be 'injured' only when the . . . effects . . . manifest themselves." *Id.*[7]

Thirty years later, this Court's willingness to adopt a much more expansive discovery accrual rule was tested in *United States v. Kubrick*, 444 U.S. 111 (1979). In *Kubrick*, this Court ruled that accrual for limitations purposes need not await the

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Professor Corman repeatedly conflates the injury discovery accrual rule with equitable estoppel. *See id.* §§ 11.1.3 n.27, 11.1.4 n.44, 11.1.5 n.72. Accordingly, Andrews urges reading all relevant treatises critically, given that the only modern treatise available contains errors. *See Wolin v. Smith Barney Inc.*, 83 F.3d 847, 849 (7th Cir. 1996) (lamenting the paucity of "sustained scholarly attention" afforded the law concerning statutes of limitations).

[7] In *Urie*, four Justices concurred "in part." *See* 337 U.S. at 196-97 (Frankfurter, J., concurring in part). Those Justices indicated no disagreement with the majority's accrual rule. *See id.* ("Damages are recoverable under the Act for *suffering* 'injury.'" (emphasis added)). Hence, this Court in *Urie* was seemingly unanimous in its approval of the "injury discovery" accrual rule.

actual or constructive discovery of *all* of the elements of a claim (*i.e.*, duty, breach, causation and injury). *See id.* at 123-24. Balking at such an "all elements discovery" accrual rule, this Court explained:

> A plaintiff . . . , *armed with facts* about the harm done to him, can protect himself by seeking advice. . . . To excuse him from [then] promptly doing so by [further] postponing the accrual of his claim [after being armed with those facts] would undermine the purpose of the limitation statute, which is to require the reasonably diligent presentation of tort claims. . . .

Id. at 123 (emphasis added). Indeed, this Court in *Kubrick* articulated an "injury *and causation* discovery" accrual rule.[8] *Id.* at 122 ("[F]acts about causation may be in control of the putative defendant, unavailable to plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who inflicted the injury.").[9] The three dissenting Justices in *Kubrick* favored an accrual rule that is even *more* expansive than that articulated by the Court; they favored an "all elements

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[8] Perhaps the true question presented here is: "Will this Court now distance itself from the more expansive "injury and causation discovery" accrual rule that it articulated in *Kubrick* – and, if so, how far, and why?"

[9] In some other countries, statutes of limitations start running only when the plaintiff discovers both injury and its causation. In the Federal Republic of Germany, for example, the longstanding statute of limitations generally applicable to torts contains a three-year limitations period that starts running only when the plaintiff gains knowledge of both his injury *and who caused it*. *See* § 852 Absatz 1 Bürgerliches Gesetzbuch (BGB) (providing also, so as to assure ultimate repose, that no claim may be brought more than thirty years after the defendant's damaging action).

discovery" accrual rule. *See id.* at 125-26 (Stevens, J., dissenting).[10] Moreover this Court in *Kubrick* seemingly recognized that the accrual rule that it selected there would apply thereafter to myriad federal laws. When explaining its rejection of the "all elements discovery" accrual rule preferred by the dissenting Justices, this Court wrote, "[I[t would be difficult indeed not to apply the same accrual rule . . . to a whole range of negligence cases under the Act and other federal statutes. . . ." *Id.* at 124.[11]

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[10] On a continuum from the most expansive accrual rule to the least, there are (1) the "all elements discovery" accrual rule, championed by the dissent in *Kubrick*, followed by (2) the "injury and causation discovery" accrual rule, upon which this Court settled in *Kubrick*. Next is (3) the "injury discovery" accrual rule that is now generally applied by federal appellate courts. *See Cada v. Baxter Heathcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990) (citing numerous federal appellate courts' adoption of the "injury discovery" accrual rule). Next in turn is (4) the "injury occurrence" accrual rule, which was recently recognized in dicta by this Court. *See Rotella v. Wood*, 528 U.S. 549, 554 n.2 (2000). Last on this continuum is (5) TRW's recommended "violation occurrence" accrual rule, by which a cause of action accrues immediately when a potential defendant breaches its duty, irrespective of the deferral or discovery of any injury.

[11] Writing for the dissent in *Kubrick*, Justice Stevens indicated that "a claim might be deemed to 'accrue' at the moment of injury without regard to the potential harsh consequence" in "most commercial situations." 444 U.S. at 126 (Stevens, J., dissenting) (citing *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 611 (7th Cir. 1975) (construing Illinois law)). The Seventh Circuit in *Gates Rubber Co.* was careful to indicate, however, that it declined to apply the "injury discovery" accrual rule there *not* merely because commerce was involved, but because the parties there were both commercial titans of equal strength, who were operating under a contract. *See Gates Rubber Co.*, 508 F.2d at 605, 613-14 (describing the underlying facts and their import); *see also id.* at 614 ("For in Illinois, at least *when contracts between parties of relatively equal bargaining strength are being construed*, the risk . . . of negligence is treated like any other commercial risk. . . ." (emphasis added)). At the same time, the Seventh Circuit in *Gates Rubber Co.* recognized that Illinois law applied an "injury discovery" accrual rule

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Since *Kubrick*, federal appellate courts have uniformly embraced the "injury discovery" accrual rule as a minimum accrual standard. *See, e.g.*, *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 341-43 (D.C. Cir. 1991) (applying the "injury discovery" accrual rule); *Cada v. Baxter Heathcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990) (sampling various circuit courts' applications of the "injury discovery" accrual rule); *cf. American Tobacco Co. v. People's Tobacco Co.*, 204 F. 58, 61-63 (5th Cir. 1913) (applying a discovery rule to a Sherman Act violation, concluding, "No action could be brought until . . . [the corporate plaintiff] had knowledge of the facts which gave him a cause of action."). Here, Andrews discovered no injury – indeed, she discovered *nothing* concerning TRW's possible FCRA liability – until May 31, 1995. *Supra* pp. 6-7. She filed this action on October 21, 1996. *Supra* p. 8. Applying the "injury discovery" accrual rule here would allow this Court to affirm the judgment below.

D. This Court Has Articulated and Applied the "Injury Discovery" Accrual Rule to Various Types of Injuries – Individual and Corporate, Bodily and Otherwise.

This Court recently indicated that "the cry for a discovery [accrual] rule is loudest" when there is medical malpractice. *Rotella v. Wood*, 528 U.S. 549, 555 (2000). Indeed, this Court's 1979 decision in *Kubrick v. United States* concerned a claim for medical malpractice. *See* 444 U.S. at 113-15. Somewhat similarly, this Court's 1949 decision in *Urie v. Thompson* concerned a plaintiff's discovery of an occupational disease, silicosis, which affects the pulmonary system. *See* 337 U.S. at 165-66. This Court has not, however, limited its application of the "injury discovery" accrual rule to cases involving latent bodily injuries. Instead, this Court has also articulated and applied the same "injury discovery" accrual rule regarding strictly economic damages suffered by a corporation.

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to claims brought by consumers, noting that "rules [that] had been developed to meet the needs of commercial transactions were inadequate to afford the necessary consumer protection." *Id.* at 609-10.

Specifically, in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), this Court had the opportunity to consider issues related to the running of the Clayton Act's statute of limitations. *See* 401 U.S. at 338-42. In *Zenith*, this Court wrote the following sentence: "Generally, a cause of action accrues and the statute of limitations begins to run when a defendant commits an act that injures a plaintiff's business." *Id.* at 338. It then cited authorities indicating that accrual occurs no sooner than when an actionable injury is suffered. *See Zenith*, 401 U.S. at 338 (citing *Suckow Borax Mines Consol., Inc. v. Borax Consol., Ltd.*, 185 F.2d 196, 208 (9th Cir. 1950) (indicating that accrual must await injury), *Bluefields S.S. Co. v. United Fruit Co.*, 243 F. 1, 20 (3d Cir. 1917) (same), and *2361 State Corp. v. Sealy, Inc.*, 263 F. Supp. 845, 850 (N.D. Ill. 1967) (same)).

Later in the same paragraph, this Court provided the following clarifying example, articulating the "injury discovery" accrual rule precisely:

> Thus, if a plaintiff *feels* the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred *by* [*i.e., on or before*] that date and all provable damages that will flow in the future from acts of the conspirators on that date.

Zenith, 401 U.S. at 339 (emphasis added).

Hence, this Court in *Zenith* recognized that a Clayton Act cause of action does not accrue until the plaintiff *feels* (i.e., *consciously suffers*) an injury. Upon initially *feeling* an injury, the plaintiff can then bring suit for, *inter alia*, all damages incurred *by* the time thereof, which indicates that actionable injury could occur *before* the accrual, but remain unnoticed until then. Therefore, this Court's opinion in *Zenith* very clearly articulates the "injury discovery" accrual rule – once again without dissent, just as it had in *Urie* more than twenty years earlier.[12]

TRW erroneously relies on the sentence from *Zenith* (the first one quoted above) to argue that Section 618's limitations period starts running immediately upon a defendant's wrongful act or violation of its duty of care. Br. at 11, 15, 42. TRW thus implies that this Court in *Zenith* held that causes of action generally accrue as soon as the respective defendant commits a *potentially* damaging act, even though damage might not result until some later time.[13] TRW has simply read out of context

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[12] In *Zenith*, two Justices concurred in the result while finding it "unnecessary to express any view on the . . . difficult issues" that the Court discussed. *See Zenith*, 401 U.S. at 349 (Harlan, J., concurring).

[13] TRW cites two federal cases for the proposition that the laws of two states (Maryland and Georgia), more than thirty years ago, did not embrace the injury discovery accrual rule and, instead, construed statutes of limitations most restrictively. *See* Br. at 15 (citing *Atwell v. Retail Credit Co.*, 431 F.2d 1008 (4th Cir. 1970) (applying Maryland law) and *Peacock v. Retail Credit Co.*, 302 F. Supp. 418, 422 (N.D. Ga. 1969) (applying Georgia law)). But see, for example, *Cigna Ins. Co. v. Oy Saunatec, Ltd.*, 241 F.3d 1 (1st Cir. 2001):

> Both Rhode Island and Massachusetts . . . have adopted a discovery rule . . . governing the accrual of causes of action in which an injury or its cause is inherently unknowable. The discovery rule prevents the cause of action of an injured plaintiff from accruing until the plaintiff learns, or reasonably should have learned, that he has been harmed by the defendant's conduct.

Id. at 10-11 (citations and quotations omitted).

TRW also cites to 50 Am. Jur. 2d, *Libel and Slander* § 390 (1970) for historical legal notions concerning defamation generally. A more current version of that same authority explains that a discovery accrual rule should apply generally to latent causes of action for defamation – and specifically to causes of action against credit reporting agencies. *See* 50 Am. Jur. 2d, *Libel and Slander* § 421 n.9 and accompanying text (1995).

the one sentence from *Zenith*, ignoring the accompanying citations and – more importantly – the helpful, clarifying example that follows.[14]

Importantly, in *Zenith*, there was no bodily injury, as there was in *Urie* and later in *Kubrick*. The plaintiff in *Zenith* was a corporation that had suffered only lost sales and profits. *See Zenith*, 401 U.S. at 323 ("The difference between the profits it actually made and the profits it would have made . . . was the measure of damages demanded."). Accordingly, this Court's precedents do not limit application of the "injury discovery" accrual rule to specific types of plaintiffs or to physical injuries.

Finally, one could argue that Section 618 must be strictly construed because it contains reference to the jurisdiction of courts. *Compare* Section 618 (referring to jurisdiction of courts), *with Hardin v. City Title & Escrow Co.*, 797 F.2d 1037, 1039-41 (D.C. Cir. 1986) (discussing the construction of "jurisdictional" statutes of limitations). Even if so, equitable discovery principles apply to strictly construed statutes of limitations. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (holding that strict construction of statutes of limitations does not rule out application of equitable tolling). Indeed, writing in *Cada v. Baxter Healthcare Corp.*, the Seventh Circuit was careful not to indicate that the jurisdictional nature of a statute of limitations would bar application of the "injury discovery" accrual rule. *See* 920 F.2d at 451 ("Neither [equitable tolling nor equitable estoppel – in distinction to the injury discovery rule] applies to a jurisdictional statute of limitations.").[15] Therefore, Section 618 is amenable to application of the "injury discovery" accrual rule, notwithstanding strict construction.

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[14] In *Klehr v. A. O. Smith Corp.*, 521 U.S. 179 (1997), Justice Scalia, joined by Justice Thomas, filed a concurrence in which they invoked the same sentence from *Zenith* which TRW quotes here. *See* 521 U.S. at 198 (Scalia, J., concurring). Quoting that one sentence specifically, these Justices opined: "[O]f the four main accrual rules (injury, injury and discovery, injury and pattern discovery, and last predicate act), the appropriate accrual rule is the Clayton Act 'injury' rule. . . ." *Id.* (dismissing the "injury and discovery" accrual rule). It appears plausible that the concurrence in *Klehr* may not have considered the clarifying example set forth in this Court's *Zenith* opinion. If so, Andrews respectfully asks this Court to consider returning to its historical unity concerning the "injury discovery" accrual rule.

II. AT THE EARLIEST, SECTION 618's LIMITATIONS PERIOD STARTS RUNNING ONLY WHEN "LIABILITY EXISTS," WHICH REQUIRES THE COALESCENCE OF ALL ELEMENTS OF LIABILITY, INCLUDING "ACTUAL DAMAGES."

A. Even if One Assumes Arguendo That the "Injury Discovery" Accrual Rule Cannot or Should Not Apply, Liability "Exists" Under FCRA's Negligence Provision Only if and When One Suffers "Actual Damages."

Returning to the principle that statutory interpretation begins with the statutory language itself, Andrews acknowledges that the word "arises," as set forth in the phrase "liability arises," may be somewhat ambiguous. Specifically, although the word "arises" commonly refers to a "springing up," "coming into notice," or presentation (hence, a manifestation), it can alternatively mean "comes into existence. . . ." *See* 1 The Oxford English Dictionary 629 (2d. ed. 1989). If one applies this alternative definition, liability "arises" under FCRA when it first comes into existence, irrespective of its deferred presentation. Assuming arguendo that this alternative definition of "arises" applies to Section 618, the next logical question should be: "What conditions are required for 'liability' to 'exist' under FCRA, thus commencing its limitations period?"

The term "liability" can have a broad variety of meanings. *See* Black's Law Dictionary 914 (6th ed. 1990) (defining liability very broadly). Consistent with cardinal principle, however, no liability exists under FCRA – and no cause of action accrues – unless and until all necessary elements of a statutory cause of action coalesce: duty, breach, causation, and *injury*. *See Rotella v. Wood*, 528 U.S. 549, 558 n.4 (2000) ("cardinal principle that a cause of action does not begin to run until the cause of action is complete"); *Jamison v. Encarnacion*, 281 U.S. 635, 641 (1930) ("[L]iability arises when one *suffers injury* as a result of any breach of duty owed to him by another. . . ." (emphasis added)).

Under FCRA, "liability" is expressly and narrowly defined. Pursuant to FCRA's principal liability provision, 15 U.S.C. § 1681o, civil liability for negligent noncompliance exists only where "*actual damages* [are] sustained by the consumer as a result of the [defendant's] failure" to comply with FCRA. 15 U.S.C. § 1681o (emphasis added). Thus, under FCRA, no liability arises before the consumer realizes actual damages.[16] *See, e.g., Kates v. Crocker Nat'l Bank*, 776 F.2d 1396, 1397 (9th Cir. 1985) (related FCRA provisions should be read together).

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[15] The Seventh Circuit decided *Cada* just ten days after this Court decided *Irwin*. *Compare Irwin*, 498 U.S. 89 (decided Dec. 3, 1990), *with Cada*, 920 F.2d 446 (decided Dec. 13, 1990). It appears, however, that the Seventh Circuit in *Cada* had not fully digested *Irwin*. Specifically, in *Cada*, the court of appeals indicated – quite contrary to this Court's holding in *Irwin* – that equitable tolling cannot apply to jurisdictional statutes of limitations. *Compare Irwin*, 498 U.S. at 95-96 (holding that strict construction of jurisdictional statutes of limitations does not rule out equitable tolling), *with Cada*, 920 F.2d at 451 (after citing *Irwin*, ruling exactly the opposite).

[16] TRW cites a 1983 law review article to suggest that, historically, defamation claims accrued upon publication (i.e., upon the defendant's violation), irrespective of a plaintiff's injury or its discovery. *See* Br. at 33 (citing Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 Geo. L.J. 95, 99-100 (1983)). The same commentary confirms, however, that Congress changed the law from the status quo ante by making actual damages the *sine qua non* for negligent FCRA violations. *See* 72 Geo. L.J. at 121-23 (discussing the actual damages requirement for FCRA liability). Thus, TRW's chosen authority undermines its argument.

Here, Andrews realized no actual damages prior to May 31, 1995 – the date on which she first discovered TRW's violations or, more accurately, suffered any effects because of them. Only then were her potential, unrealized damages transformed into actual damages. Simply put, because Andrews had not yet suffered actual injury, *she had no FCRA claim to bring before May 31, 1995.*[17]

Because Andrews possessed no FCRA claim before May 31, 1995, it would be an "odd result" for this Court to find that FCRA's limitations period began running before her claim had accrued.

> While it is theoretically possible for a statute to create a cause of action that accrues at one point in time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, *we will not infer such an odd result* in the absence of such indication in the statute.

Reiter v. Cooper, 507 U.S. 258, 267 (1993) (emphasis added). In enacting FCRA, Congress gave no indication that it wanted FCRA's limitations period to start running before a claim accrues.[18]

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[17] In reply, TRW may claim that a consumer immediately suffers actual damages whenever a reporting agency violates his or her privacy rights, behind the scenes and unbeknownst to the consumer. This attenuates the meaning of actual damages. Although any privacy violation is itself condemnable and *potentially* very injurious, the unwitting victim suffers no actual damages unless and until some personal realization occurs, usually through discovery. Because the statutory right of action for any negligent FCRA violation requires actual damages, mere metaphysical legal detriment or inchoate, potential damages will not suffice. *Cf. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 37 (1998) ("[Where] [t]he language is straightforward, and with a straightforward application ready at hand, statutory interpretation has no business getting metaphysical.").

[18] TRW might argue that FCRA liability can, in some rare cases, (Cont'd)

Hence, even if one were to afford the term "arises" an uncommonly broad meaning, so as to avoid applying the "injury discovery" accrual rule to Section 618, one should not then also afford the term "liability" a similarly broad meaning, so as to avoid an "actual injury occurrence" accrual rule. Only by giving unduly broad definitions to *both* of the terms – "liability" and "arises" – could one arrive at the "violation occurrence" accrual rule that TRW recommends here. As shown below, Congress deliberately rejected a "violation occurrence" accrual rule when it enacted Section 618.

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arise before any actual injury, because 15 U.S.C. § 1681n allows both actual and punitive damages for any willful violation of FCRA. *See* 15 U.S.C § 1681n (as originally enacted and in effect during the years relevant to this case, reprinted at OBA 8a). From there, TRW may note that punitive damages could hypothetically attach immediately upon willful wrongdoing, thus triggering the start of Section 618's limitations period. Given this scenario, however, a different discovery rule should apply, based upon venerable equitable tolling principles. Equitable tolling is invoked when the would-be plaintiff cannot, despite reasonable diligence, obtain information essential to bringing suit. *See Wolin v. Smith Barney Inc.*, 83 F.3d 847, 851-52 (7th Cir. 1996) (discussing the applicability of equitable tolling where "the defendant has made no special effort to cover up"); *cf. United States v. Kubrick*, 444 U.S. at 123-24 (after discovering certain elements, a would-be plaintiff must then exercise reasonable diligence to investigate claim for actionable negligence). Indeed, for centuries, courts have maintained that they "will not encourage, nor in any manner protect[,] the abuse of confidence, and therefore no length of time shall bar a fraud; . . . unless it appears that the circumstances of the fraud were known to the party. . . ." JOHN FONBLANQUE, TREATISE OF EQUITY 244-46 (E. Merriam & L. Merriam eds., 4th ed. 1835). *Accord Bailey v. Glover*, 88 U.S. (21 Wall) 342, 349-50 (1874) (discussing equitable tolling where the wrongdoing "is of such character as to conceal itself"); *Willison v. Watkins*, 28 U.S. (3 Pet.) 43, 52-53 (1830) (discovery accrual rule applies to any fraud or breach of trust); *Epstein v. United States*, 174 F.2d 754, 765-66 (6th Cir. 1949) (defining constructive fraud as any breach of confidence). Of course, it would be the height of inequity to reward a defendant for willfulness in violation by accelerating accrual and thereby effectively truncating the plaintiff's limitations period.

B. Specific Textual Changes Made When Congress Drafted Section 618 Indicate That Its Limitations Period Does Not Start Running Merely Upon the Violation of a Statutory Duty.

Reading Section 618 with FCRA's principle liability provision thus compels the conclusion that "liability arises" under FCRA only when actual injury is complete, at the earliest. TRW argues instead that Section 618's history reveals Congressional intent to enact an exceptionally restrictive statute of limitations – one which starts running upon a mere *violation* of statutory duty of care – coupled with a special misrepresentation exception. Br. at 36-37. In so doing, TRW ignores the most telling evidence that Congress intended otherwise. Plain language that would have commenced Section 618's limitations period upon the mere "violation" of FCRA duties was drafted, deliberated, and then discarded by Congress – only to be replaced by the "liability arises" language.

FCRA was first introduced in the Senate in 1969. *See* S. 823, 91st Cong., 115 CONG. REC. 2415-16 (Jan. 31, 1969). The bill would have prescribed an extremely restrictive two-year statute of limitations reflecting a "violation occurrence" rule. *See id*; *see also* 116 CONG. REC. 32641 (Sept. 18, 1970) ("Any action under [FCRA] may be brought . . . within two years from the date of the occurrence of the violation."). Had it ever become law, this language would have keyed the start of FCRA's limitations period to the date of a defendant's allegedly wrongful act.[19]

During 1969 and 1970, however, the House considered competing proposals for governing the credit reporting industry.[20] The House favorite, H.R. 16340, would have provided a relatively expansive, five-year limitations period – albeit, like the Senate bill, keyed to the date of violation. *See* H.R. 16430, 91st Cong., 116 CONG. REC. 6200 (Mar. 5, 1970) (Section 27, Jurisdiction of Courts, Limitation of Actions, "Civil actions may be brought . . . within 5 years of the violations.").

Eventually, the Senate's bill was attached as an amendment to a non-germane House bill. *See* 116 CONG. REC. 32638 (Sept. 18, 1970). Congressional conferees then met and refashioned FCRA into its final form. *See id.* at 34149 (Sept. 29, 1970) (House conferees selected); *id.* at 35843 (Oct. 8, 1970) (conference report). When FCRA emerged from conference, it contained a new and different Section 618. No longer was it keyed to the date of "the occurrence of the violation." Instead, it was keyed to when "liability arises," with a special exception for rare misconduct – where a defendant willfully misleads a would-be plaintiff concerning its extant liability. "A 2-year statute of limitations *from the date liability arises* is provided, except that where the defendant has willfully misrepresented information material to the establishment of . . . [its potential] liability, the statute does not begin to run until discovery of such a misrepresentation." 116 CONG. REC. 36573 (Oct. 13, 1970) (Rep. Sullivan's explanation of final act) (emphasis added).[21]

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[19] From time to time, Congress has enacted consumer-protection statutes with limitations periods commencing specifically upon the date of the occurrence of a violation. *See, e.g.*, 15 U.S.C. §§ 1640(e) (Truth in Lending Act) (keying the start of its limitations period to the date of occurrence of a violation, in contradistinction to FCRA as ultimately enacted); 1679i(1) (Credit Repair Organizations Act) (same), 1691e(f) (Equal Credit Opportunity Act) (same), 1692k(d) (Fair Debt Collection Practices Act) (same), and 1693m(g) (Electronic Funds Transfer Act) (same).

[20] *See, e.g.*, 115 CONG. REC. 33824 (Nov. 12, 1969) (introduction of H.R. 14765); 116 CONG. REC. 6200-01 (Mar. 5, 1970) (introduction of H.R. 16340 by Rep. Sullivan); *id.* at 7796 (Mar. 17, 1970) (support for H.R. 16340 from author of the earlier bill).

[21] TRW is not helped by the fact that the conferees added the misrepresentation exception to Section 618. Congress could have, and presumptively would have, maintained the reference to "the occurrence of the violation" when it added the misrepresentation exception if it had intended TRW's recommended construction; but Congress did not. Indeed, the fact that Congress rejected the more restrictive "occurrence

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An obvious explanation for Section 618's ultimate language is that Congress compromised by choosing a more accommodating *type* of statute of limitations. The ultimate statute is neither the two-year, most restrictive type of "violation occurrence" statute sought by the Senate, nor the five-year, but otherwise similar, statute favored by the House. Rather, the final enactment suggests a moderate bridging of the difference between the two houses of Congress. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation and quotation omitted).

TRW's reaction to Congress' rejection of the "occurrence of the violation" language, and its substitution of the "liability arises" language, is to argue that "some [recorded] discussion of the transformation would be expected." Br. at 37-38. Mustering evidence of Congressional intent concerning FCRA is difficult, however, due to FCRA's transformation in conference. Regarding the transformation, one Senator commented: "Interpretations of amendments accepted by the Senate in conference cannot properly . . . mean other than the meaning discussed and agreed to by the conferees in the conference." 116 CONG. REC. 35943 (Oct. 9, 1970) (remarks of Sen. Bennett). Given both the secretive nature of the conference and the intervening passage of time, it is impossible to ascertain the conferees' various discussions and agreements about the changes wrought in conference. *Cf. Conroy v. Aniskoff*, 507 U.S. 511, 518-528 (1993) (Scalia, J., concurring) (questioning the value of perusing through legislative history). Indeed, the only point that is now clear is that Congress changed the threshold of the limitations period from the date of the statutory violation to the date on which "liability arises."

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of the violation" language is so compelling that it should easily outweigh all other reasonably applicable canons of construction. For example, one could argue that because Congress created a new statutory right by enacting FCRA, this is "some evidence" that the right was meant to be limited. *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998) (discussing this canon). Congress' rejection of the "violation occurrence" language is ample counterweight to any such presumed evidence.

TRW argues alternatively that the 1996 amendments to FCRA – where Congress left Section 618 unchanged – must be interpreted as implied ratification of certain federal appellate decisions that had rejected application to Section 618 of a generally applicable discovery accrual rule. *See* Br. at 39-40 (TRW arguing that "Congress is presumed to be aware of settled judicial interpretation of a statute's language when it reenacts or amends a statute . . . [and] does not change the language."). TRW's implied ratification argument has several defects. First, judicial interpretation of Section 618 was not settled in 1996, when Congress debated various FCRA amendments. To the contrary, a pronounced, inter-circuit split had arisen by 1995. *Compare Clark v. State Farm Fire & Cas. Ins. Co.*, 54 F.3d 669, 672 (10th Cir. 1995) ("We have reviewed the *Hyde* opinion and find it not to be persuasive."), *with Hyde v. Hibernia Nat'l Bank*, 861 F.2d 446, 448-49 (5th Cir. 1988) (applying an "injury occurrence" rule to Section 618), *cert. denied sub nom. Credit Bureau Services – New Orleans v. Hyde*, 491 U.S. 910 (1989). Second, although one may assuredly assume that Congress heeds this Court's final opinions concerning federal laws, one should not assume that Congress heeds the lower courts' decisions for purposes of implied ratification, especially without direct evidence that the Congress considered the issue. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 336 n.7 (1971) (declining to recognize implied ratification of appellate rulings). Finally, there is no indication that Congress, in 1996, ever deliberated about the profound accrual issues that now confront this Court.[22]

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[22] Recently, this Court noted that questions concerning discovery accrual rules may be "subtle and difficult." *See Klehr v. A. O. Smith*
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III. SECTION 618 CONTAINS AN ADDITIVE ESTOPPEL EXCEPTION, WHICH OPERATES ONLY IN RARE, EGREGIOUS CASES TO EXTEND – BUT NOT TO TRUNCATE – FCRA'S PRIMARY LIMITATIONS PERIOD.

If Congress had stopped at Section 618's main provision (whereby an action under FCRA may be brought "within two years from the date on which liability arises"), TRW would have little argument supporting its recommended interpretation of Section 618; and a discovery accrual rule would then readily apply. *See Rotella v. Wood*, 528 U.S. 549, 555 (2000) ("Federal courts, to be sure, generally apply a discovery rule when a statute [of limitations] is silent on the issue. . . ."). Congress did not stop, however, at Section 618's general provision. Rather, Congress appended this:

> . . . except that where a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to an individual[,] and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this subchapter, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

Careful analysis of the misrepresentation exception's operation leads to an understanding of its compatibility with the "injury discovery" accrual rule. Properly construed, the exception provisionally addresses a particularly egregious and distinct type of misconduct, which – if left unaddressed – could frustrate proper operation of the "injury discovery" accrual rule.

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Corp., 521 U.S. 179, 192 (1997). Given such profundity, nothing suggests that Congress had these issues firmly in its consciousness as of 1996. *Cf. Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 192 (1971) (squarely rejecting a nearly identical implied ratification argument when applying a discovery accrual rule concerning legal malpractice).

Drawing both parts of its argument from the Third Circuit's opinion in *Houghton v. Insurance Crime Prevention Inst.*, 795 F.2d 322 (3d Cir. 1986) and its progeny, TRW argues that Section 618's "misrepresentation exception" supports its position here. On one hand, TRW argues that reading a discovery accrual rule into Section 618's primary provision would render the "misrepresentation exception" *superfluous*. Br. at 23-25. On the other, TRW argues that Congress' provision of the misrepresentation exception, with its reference to a specific type of discovery, evidences Congressional intent to foreclose application of any other discovery rule to Section 618's primary provision. *Id.* at 20-23. Both components of TRW's legal argument fail.

A. Applying a Discovery Accrual Rule to Section 618's Primary Provision Does Not Render Its Misrepresentation Exception "Superfluous."

In 1986, the Third Circuit declined to apply a discovery accrual rule to Section 618's primary provision. *See Houghton*, 795 F.2d at 325. In rejecting the plaintiff's argument, the *Houghton* court wrote, "If we construe . . . [Section 618] as permitting us to imply a discovery exception to circumstances other than . . . [those which would trigger the misrepresentation exception], we would be rendering *superfluous* the discovery exception which Congress did set forth [i.e., the misrepresentation exception]." *Id.* (emphasis added). TRW similarly argues here that the misrepresentation exception would be rendered superfluous if one were to interpret Section 618 as accommodating any discovery accrual rule. *See* Br. at 23-25; *see also id.* at 24 ("[A] general discovery rule would apply [only] in the same circumstances as the misrepresentation exception[,] and delay the statute of limitations in the same manner as the [misrepresentation] exception's discovery provision, thereby rendering the [misrepresentation] exception superfluous.").

Both the Third Circuit in *Houghton* and TRW here have overlooked the crucial distinction between (1) the initial discovery of an actual injury or violation in the normal situation, and (2) the entirely distinguishable discovery of a reporting agency's subsequent, willful misconduct in the rare and egregious case. As shown below, these two different situations involve the distinguishable discoveries of distinguishable misconduct. The following examples demonstrate the independent and harmonious operation of (1) the "injury discovery" accrual rule applied to Section 618's primary provision, and (2) the misrepresentation exception:

1. *Operation of the Injury Discovery Accrual Rule in Section 618's Primary Provision.*

Assume that a reporting agency breached its statutory duty of care under FCRA – e.g., breached a consumer's financial privacy – on January 1, 2001. Assume also that the consumer discovers no hint of such misconduct or its ramifications until January 1, 2002 – exactly one year later. Under such circumstances, the "injury discovery" accrual rule will operate to forestall commencement of Section 618's two-year limitations period until such time as the liability first arises (springs up, presents itself) in January 2002. The consumer will therefore have until January 1, 2004 to marshal and evaluate evidence, consult with and secure suitable counsel, and commence suit against the reporting agency. In this scenario, the consumer may commence suit within exactly three years following the reporting agencies' original January 2001 misconduct (the statutory violation).

2. *Separate Operation of the Misrepresentation Exception.*

Assume additionally that *after* the consumer first discovers, on January 1, 2002, the original, January 2001 misconduct, he demands certain relevant information from the potential defendant reporting agency. *See* 15 U.S.C. § 1681g (consumers' statutory right to demand certain disclosures from reporting agencies). If, several weeks later, still in January 2002, the consumer receives the demanded disclosures from the reporting agency, but they include a *willful misrepresentation* material to the reporting agency's extant FCRA liability, then the original cause of action will be tolled – indefinitely. In such a situation, where outright deceit intervenes, Congress concluded that a normal accrual rule will no longer adequately protect the consumer. Accordingly, where the premise of the misrepresentation exception is met, the consumer's two-year limitations period will start anew if and when the consumer ultimately discovers the falsity of the reporting agency's intervening misrepresentation.

Thus, if the consumer first discovers the falsity of the reporting agency's misrepresentation on July 1, 2006, the consumer will then have two years following the discovery of this particularly egregious, intervening misconduct to bring suit concerning the seminal January 1, 2001 FCRA violation. The last day to proceed under such circumstances will be on July 1, 2008. That is 7½ years after the reporting agency's seminal misconduct, 6½ years after when liability first "arose" (the date of the discovering actual injury), slightly less than 6½ years after the reporting agency's even more egregious willful misconduct (the intervening misrepresentation), and two years after discovering the willful misrepresentation.

As these two examples demonstrate, Section 618's misrepresentation exception is both compatible with, and entirely distinguishable from, the proper application of the "injury discovery" accrual rule to Section 618's primary provision. Indeed, the misrepresentation exception reflects Congress' insistence that any diligent consumer who *already* suspects a reporting agency's violation, but is then willfully deceived about such matters, does not lose his day in court through the lapse of time while deceived. This misrepresentation exception therefore codifies *equitable estoppel*, which, unlike the "injury discovery" accrual rule, effectively operates to *extend* the limitations period *after* accrual. *See Cada v. Baxter Heathcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990) (distinguishing the injury discovery accrual rule from equitable estoppel and equitable tolling). Properly understood, discovery accrual rules (other than the extreme "all elements discovery" accrual rule championed by the dissent in *Kubrick*, *see supra* n.10 and accompanying text) do not render equitable estoppel *superfluous*, or vice versa, as the Third Circuit erroneously concluded in *Houghton*. *See Cada*, 920 F.2d at 450-51.[23]

B. *Houghton v. Insurance Crime Prevention Inst.* and Its Progeny Misapplied the Doctrine of *Expressio Unius Est Exclusio Alterius*, Thereby Erroneously Truncating Section 618's Limitations Period.

TRW argues alternatively that Congress' enactment of the misrepresentation exception should be regarded as intent to proscribe application of any discovery rule to Section 618's primary provision, by virtue of the doctrine of *expressio unius est exclusio alterius*. *See* Br. at 21-23. Here again, TRW draws its argument from the Third Circuit's erroneous *Houghton* decision and its progeny. *See* Br. at 12 n.4; *Houghton*, 795 F.2d at 325; *see also Clark v. State Farm Fire & Cas. Ins. Co.*, 54 F.3d 669, 670-72 (10th Cir. 1995) (following and attenuating *Houghton*); *Rylewicz v. Beaton Serv., Ltd.*, 888 F.2d 1175, 1181 (7th Cir. 1989) (same); *Clay v. Equifax, Inc.*, 762 F.2d 952, 961 (11th Cir. 1985) (dismissing plaintiff's discovery accrual argument without explanation). Once again, TRW makes an erroneous argument.

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[23] As the Seventh Circuit noted in *Wolin v. Smith Barney Inc.*, 83 F.3d 847 (7th Cir. 1996), the "law concerning statutes of limitations fairly bristles with subtle, intricate, often misunderstood issues. . . ." 83 F.3d at 849. Indeed, the only published law review article concerning Section 618 also ignores the distinctly different situations, and erroneously suggests that the "trigger" for applying a discovery rule would necessarily be the exact same "trigger" for applying the willful misrepresentation exception. *See* Martha F. Davis, *Solving Statute of Limitations Problems Under the Fair Credit Reporting Act*, 18 Ind. L. Rev. 507, 511 n.31 (1985). On that erroneous basis, the article's author concludes that the normal federal discovery rule could not apply to FCRA. *Id.*

Generally, the doctrine of *expressio unius* "is a dangerous master to follow in the construction of statutes." *Custis v. United States*, 511 U.S. 485, 501-02 (1994) (Souter, J. dissenting) (quoting *Ford v. United States*, 273 U.S. 593, 612 (1927) (internal quotations and additional citations omitted)). Recognizing this principle, courts often hold that an enactment of some express legislative exception or exceptions will not necessarily rule out the finding of other implied exceptions. *See, e.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983) (noting that *expressio unius* cannot be applied when differing provisions address *different misconduct*). But assuming arguendo that the Section 618's special misrepresentation exception were the singular exception that might alter Section 618's main provision, one should then ask the next question, "an exception to what?"

Answering this, one should naturally examine how Section 618 would operate without the exception. Stripped of the exception, Section 618 would read as follows:

> An action to enforce any liability created under [FCRA] may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years of the date on which the liability arises.

Section 618 (omitting the misrepresentation exception).

Thus, stripped of the exception, what remains of Section 618 is a simple, straightforward statute of limitations. Consistent with federal norms, a discovery accrual rule applies – precisely because Section 618's primary provision remains silent on the issue. *See Rotella v. Wood*, 528 U.S. 549, 555 (2000) ("Federal courts, to be sure, generally apply a discovery rule when a statute [of limitations] is silent on the issue. . . .").[24] Assuming

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[24] This Court has been reluctant to rule against applying a discovery rule unless the legislative mandate to do so is clear and

(Cont'd)

arguendo that a discovery accrual rule should not apply, however, Section 618 – stripped of the misrepresentation exception – still would not express TRW's recommended "violation occurrence" rule. *See Ferguson v. Roberts*, 11 F.3d 696, 705 (7th Cir. 1993) ("The legislative history in 1934 makes it pellucid that Congress included statutes of repose. . . ."); *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d at 1042-43 (10th Cir. 1980) (adopting a restrictive interpretation a statute of limitations because the "section uses strong and unambiguous terms").[25] Therefore, at a minimum, Section 618's main provision requires application of an "actual injury occurrence" rule, such that this Court may nonetheless affirm the court of appeals' judgment. *See supra* pp. 22-29.

(Cont'd)

unambiguous, or unless its application would be "*fundamentally inconsistent* with" the related legislative provisions. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (emphasis added). Indeed, in *Lampf*, four dissenting Justices disputed the Court's adoption of the restrictive statute of limitations there, preferring a discovery rule instead. *See id.* at 366-69 (Steven, J., dissenting); *id.* at 372 (O'Connors, J., dissenting) ("[I]t would be most inequitable to hold that a plaintiff has slept on his rights during a period in which . . . he . . . could [not] have known the time limitation that applied to the case." (citations, quotations and alterations in the original omitted)); *id.* at 374-79 (Kennedy, J., dissenting) (recognizing this Court's "obligation to reject a limitation rule that would 'frustrate or significantly interfere with federal policies'" (citation omitted)).

[25] The harshest type of statute of limitations (one that commences the limitations period upon a defendant's wrongful act, irrespective of any injury or its discovery) is sometimes called a "statute of repose." *See, e.g., Hinkle by Hinkle v. Henderson*, 85 F.3d 298, 301 (7th Cir. 1996) (discussing the distinction between statutes of limitations and repose); *Bradway v. American Nat'l Red Cross*, 992 F.2d 298, 300-01 (11th Cir. 1993) (same); Black's Law Dictionary 1411 (6th ed. 1990) (defining "statute of repose"). TRW seems to interpret this term broadly, however (*see* Br. at 39), perhaps because this Court has, from time to time, indicated that all statutes of limitations are statutes of repose. (Cont'd)

Looking beyond FCRA itself, the proper construction of Section 618's misrepresentation exception may be further ascertained by examining cases in which federal appellate courts construed similar language in other federal acts. *See ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 284-85 (1987) (holding that similar language in two statutes should be afforded the same construction). Indeed, when interpreting a statute that is nearly identical to Section 618, and includes a virtually identical "misrepresentation exception," four circuit courts of appeals (including two that followed *Houghton* into error) found that the statutory language embodies a discovery accrual rule. The lead amongst these cases is *Tijerina v. Walters*, 821 F.2d 789 (D.C. Cir. 1987), which was decided one year after *Houghton*. In *Tijerina*, the District of Columbia Circuit interpreted the Privacy Act's two-year statute of limitations governing personal privacy breaches by the federal government – 5 U.S.C. § 552a(g)(5), which is virtually identical to Section 618. *See* ER 276 (side-by-side comparison of the statutes of limitations).[26]

(Cont'd)

See, e.g., Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 136 (1938) ("The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims. . . ."). So as to avoid confusion, Andrews does not use this term of art here, even though it aptly describes TRW's recommended construction of Section 618.

[26] The Privacy Act was enacted in 1974, four years after FCRA. *See* Pub. L. No. 93-579, § 2, 88 Stat. 1896 (1974). The only substantial textual difference between the Privacy Act's statute of limitations and FCRA's Section 618 is that the former commences when the "cause of action arises" whereas the latter commences when the "liability arises." *Compare id.* (the Privacy Act's statute of limitations), *with* Section 618. In addition, the Privacy Act does not limit liability for negligent violations to actual damages, as does FCRA. *See* 15 U.S.C. § 1681o. Neither of these two differences supports TRW's argument for a "violation occurrence" rule; nor does either influence whether a discovery accrual rule applies.

Rejecting the federal government's argument that the Privacy Act's limitations period started running upon the mere occurrence of a statutory violation, the court of appeals held that accrual does not occur "until the plaintiff knows or should know of the alleged violation." *Tijerina,* 821 F.2d at 797-98.[27] Specifically, the court of appeals first cited this Court's ruling in *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 427 (1965), for the proposition that Congressional intent must guide the interpretation of a statute of limitations. *See Tijerina,* 821 F.2d at 797. The court of appeals then explained the harmonious operation of the added estoppel exception alongside a general discovery accrual rule, using words that are precisely applicable here:

> Contrary to . . . [defendant's] suggestion, our holding does not read out of existence the . . . [estoppel exception]. That clause extends the normal limitations period in order to ensure that the . . . [defendant] cannot escape liability by purposefully misrepresenting information that could establish that it already has violated the Act. In such cases, the Act allows the period to commence upon actual discovery of the misrepresentation, whereas our holding today is that for other actions under the Act, the period begins [to run] when the plaintiff knew or should have known of the violation. Our holding thus in no way affects the special treatment Congress provided for the particularly egregious cases of [defendant] misconduct singled out in the Act's statute of limitations.

Id. at 798 (citation omitted).

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[27] Notably, in *Tijerina*, the Court of Appeals ruled that the Privacy Act's limitations period should start running upon discovery of a *violation*, rather than an *injury*. *Compare Tijerina,* 821 F.2d at 797-98 (invoking what is essentially a *violation* discovery rule), *with Rotella v. Wood*, 528 U.S. 549, 554 (2000) (discussing rather an *injury* discovery rule). As this case illustrates, however, a plaintiff's discovery of a privacy violation will usually coincide with the first suffering of injury.

One year later, the Ninth Circuit adopted the reasoning from *Tijerina* in *Englerius v. Veterans Admin.*, 837 F.2d 895 (9th Cir. 1988). *See* 837 F.2d at 897-98 ("We join the Seventh, Tenth, and District of Columbia Circuits in holding that a cause of action under the Privacy Act does not arise and the statute of limitations does not begin to run until the plaintiff knows or has reason to know of the alleged violation."). Importantly, the Ninth Circuit cited *Englerius* (and thus, implicitly, *Tijerina*) as the basis for its holding below. *See* PA 6a (opinion below, citing *Englerius*). Therefore, although the court of appeals' opinion below is terse, it incorporates by reference the logic from *Tijerina* in rejecting the *expressio unius* argument that TRW presses here.[28]

Finally, TRW's *exclusio unius* argument concerning the misrepresentation exception begs a compelling question. Why would Congress give consumers two full years in which to file suit after discovering the falsity of a misrepresentation that had interrupted the running of an earlier limitations period, but not give consumers two full years in the first instance? Common sense suggests that Congress would afford consumers two full years to marshal a federal lawsuit after discovering either type of misconduct.

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[28] Even though the Privacy Act's statute of limitations, 5 U.S.C. § 552a(g)(5), is nearly identical to Section 618, both the Seventh and Tenth Circuits followed *Houghton* in refusing to apply any discovery accrual rule to Section 618. *See supra* p. 34, (discussing *Rylewics* and *Clark*). These same circuit courts of appeals indeed applied a discovery accrual rule, however, to the virtually identical Privacy Act limitations provision. *See Bowyer v. United States Dept. of Air Force*, 875 F.2d 632, 635-36 (7th Cir. 1989); *Bergman v. U.S.*, 751 F.2d 314, 316 (10th Cir. 1984), *cert. denied*, 474 U.S. 945 (1985). Given concern for sovereign immunity, there is no reason why virtually identical statutes of limitations should be interpreted to hold open the door for suits against the federal government for privacy breaches, while closing the same door for similar suits against private corporate citizens.

IV. ALL RELATED FCRA PROVISIONS SUPPORT APPLICATION OF THE "INJURY DISCOVERY" ACCRUAL RULE TO SECTION 618.

Given the history of Section 618, its plain language, and its interplay with FCRA's provision for civil liability in cases of negligent noncompliance, there should be no remaining doubt about whether a FCRA cause of action accrues before an actual injury is "suffered." Still further inspection of FCRA reveals that its related statutory provisions, 15 U.S.C. §§ 1681m(a) (hereinafter the "notice" provision) and 1681g(a) (hereinafter the "access" provision), support application of the "injury discovery" accrual rule to Section 618.

First, under FCRA's basic "notice" provision, any entity that subscribes to consumer reports must inform a consumer promptly (1) when it takes any adverse action based upon a consumer report (*e.g.*, denies the consumer credit), and (2) of the name and address of the reporting agency supplying the report. *See* 15 U.S.C. § 1681m(a); *see also* OBA 7a (the statute in effect before 1997). When functioning properly, this "notice" provision effectively alerts the consumer to the fact that an adverse action (*e.g.*, a credit denial) was based upon a particular reporting agency's disclosure, perhaps due to its failings.

Second, under FCRA's "access" provision, any reporting agency must disclose to any inquiring consumer relevant information in its files, including all non-medical information and the identities of recent recipients of its consumer reports. *See* 15 U.S.C. § 1681g(a); *see also* OBA 5a-6a (the statute in effect before 1997). This "access" provision logically complements the "notice" provision, and allows the diligent consumer to inform himself further by discovering the specified matters.

When discussing these FCRA "notice and access" provisions in its Brief, TRW exaggerates the consumer benefits of these provisions, and ignores their basic limitations. Specifically, TRW argues that these two provisions afford consumers "the means to discover quickly ... any inaccurate information in their files that harmed them." Br. at 27-28. From there, TRW concludes that the "notice and access provisions . . . ensure that ... consumers will discover *most* serious claims . . . well within the limitations period." *Id.* at 31 (emphasis added) (effectively admitting that some consumers will discover serious FCRA claims outside of TRW's recommended limitations period). Thus, according to TRW, Section 618 must be read as an extremely restrictive statute of limitations which starts running immediately upon a statutory violation. *See generally id.* at 29-32 (arguing that FCRA's "notice and access" provisions amply protect consumers). TRW's reliance on these two provisions is misplaced.

On the one hand, TRW overstates the effectiveness of the "notice" provision. In reality, victims of identity theft and other improper privacy breaches receive no timely notices of any kind. Here, for example, TRW breached Andrews' financial privacy four times before May 31, 1995. *See supra* p. 5. Andrews received no notice about any of these privacy breaches, however, until after she sought to refinance her home – more than ten months after the first violation. *See supra* p. 6-7. Most ironically, it was *the Impostor* (as the would-be credit applicant), rather than Andrews, who received any required notice whenever the Impostor suffered an "adverse action." *See* 15 U.S.C. § 1681m(a) (requiring that the credit applicant (here, the Impostor) was to be informed each time that she was denied credit "wholly or partly because of information contained in a [TRW] consumer report. . . .").

On the other hand, TRW concedes that FCRA's "access" provision merely enables consumers to "identify improper disclosures quickly *once they have reason to suspect such a disclosure.*" Br. at 28 (emphasis added). While victims of identity theft are always desperate for information *once they have reason to suspect* that someone is misusing their good name and creditworthiness, they often have no basis for suspicion for many months.[29]

The second major problem with TRW's reliance upon the "notice and access" provisions is that the resulting revelations, once they reach the proper consumer, help the consumer far less than TRW implies. For example, TRW argues that FCRA's "notification and access provisions work together to enable consumers to discover *violations* of the Act in a timely fashion." Br. at 27 (emphasis added). In truth, these provisions do no more than put a consumer on notice of a *possible* violation. *See Wolin v. Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996) (accrual occurs upon notice of a *possible* violation); *Cada v. Baxter Healthcare Corp.*, 920 F.2d at 450 (same).

FCRA is not a strict liability statute. *See Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995). Instead, FCRA requires reporting agencies to comply with professional negligence standards that involve various rules of reason and reasonableness. *See id.*; *see also* 15 U.S.C. § 1681e (standards of care). Consequently, a FCRA *violation*, which is necessary for FCRA liability to exist, is neither ascertained nor

imminently provable by merely discovering the existence of credit reporting inaccuracies, improper privacy breaches, or injury and causation. Rather, any potential plaintiff would need to determine additionally whether the defendant violated the relevant professional standard of care.[30] *See Guimond*, 45 F.3d at 1333; *cf. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 376 (Kennedy, J., dissenting) (suggesting that strict liability provisions are more amenable to restrictive statutes of limitations). Therefore, a typical FCRA plaintiff may need nearly two full years following the onset and discovery of actual injury before being in a reasonably informed position to bring a FCRA suit in federal court. *Cf.* FED. R. CIV. P. 11(b) (requiring well-founded beliefs concerning relevant facts and law when filing complaint, or risk sanctions).[31]

Finally, FCRA's "access" provision requires reporting agencies to confess to inquiring consumers certain limited information about their consumer reports issued during the two years preceding the consumer's inquiry (or, depending upon the recipient's apparent use of the report, less than two years). *See* Br. at 31-32 (discussing FCRA's "access" provision). TRW points to the relatively short extent of consumer hindsight provided by these obligatory disclosures, and argues that Congress must have had little concern for consumers who suffer privacy breaches. *See id.* To the contrary, the fact that Congress reasonably limited the reporting agencies' self-confession obligation *supports* application of the "injury discovery" accrual rule here, and tempers the impacts about which potential defendants might legitimately complain.

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[29] TRW intimates that each consumer should pay numerous reporting agencies annually to monitor their files. *See* Br. at 27, 28 n.12. Andrews acknowledges that Congress recently placed a statutory limit upon the fees that reporting agencies can charge for such supposed privileges. *See* 15 U.S.C. § 1681j(a)(1)(A). This limitation does not mean, however, that Congress intended to impose upon each of approximately 190 million consumers (tens of millions of whom live near or in poverty) the obligation to pay to *each* reporting agency $8, indexed for inflation – as an annual charge for maintaining FCRA privacy rights. Indeed, TRW suggests that 190 million consumers should be expected to provide a combined total of $1.52 billion (190 million x $8 = $1.52 billion) annually to each and every individual reporting agency, multiplied by an inflation index. Here, however, even if Andrews had sought to view her TRW credit file annually, as TRW now urges, she might not have discovered her plight any sooner than she did. Indeed, just over ten months elapsed between TRW's first privacy breach concerning her and when she discovered it. *See supra* pp. 5-7.

[30] Specifically, FCRA's "notice" and "access" provisions provide a consumer with no relevant information concerning reporting agencies' *duty of care* or compliance *vel non* with FCRA's many reasonableness standards. *See* 15 U.S.C. § 1681e (FCRA's reasonableness standards); 15 U.S.C. § 1681b(a)(3) (FCRA's reasonable belief standard). In comparison to medical malpractice, for example, ascertaining negligence in the consumer credit reporting context requires piercing a monolithic, secretive industry dominated by an oligopoly. *Cf. United States v. Kubrick*, 444 U.S. 111, 123-24 ("If there exists in the [relevant] community . . . a generally applicable standard of [medical] care, we see no reason to suppose that competent advise would not be available to the [diligent] plaintiff. . . .").

[31] As this case demonstrates, even *after* a consumer discovers that she is a victim of identity theft, and receives the required disclosures (free of any misrepresentations), the consumer might still be confused for a long time. Understandably, it could take many months to determine who is most responsible for what particular wrongdoing (the impostor, the defrauded creditors, their harassing collection agents, and/or the facilitating, slack reporting agencies). *Cf. Kubrick*, 444 U.S. at 123-24 (*after* discovery, the plaintiff must *then* begin to utilize the prospective limitations period to investigate the possibility of actionable negligence).

By limiting to two years the time in which consumers may request information about agencies' anecdotal, historical sales activities, Congress provided that repose will usually be achieved promptly. Indeed, FCRA's maximum two-year, *retrospective*, self-confession requirement combines with Section 618's two-year, *prospective* limitations period to assure that the vast majority of FCRA suits will be brought within four years following any statutory privacy violation. Four years in the ordinary case is not so short as to indicate that Congress had no concern for consumers. Nor is it so long that the policies generally underpinning statutes of limitations could be offended by application of the "injury discovery" accrual rule here. After all, *four years* from the date of the statutory violation is still more protective of the industry than the legislation preferred by the House, with its *five-year* limitations period, keyed to the date of violation. *See supra* pp. 26-28.

V. SOUND POLICY SUPPORTS APPLICATION OF THE INJURY DISCOVERY RULE TO SECTION 618.

TRW makes two main policy arguments in its Brief. First, TRW claims that, to save costs, reporting agencies continually destroy certain digital information when it becomes two years old. Thus, TRW suggests that interpreting Section 618 expansively would force agencies to store massive amounts of data for longer periods of time, at great and undue expense. *See* Br. at 30-31. Given the plummeting prices now being charged for a "terabyte" (one trillion bytes) of data storage capacity, however, reporting agencies have no cost justification for destroying all historical records of their consumer reports so quickly. *See* ER 287-88.[32]

Moreover, TRW acknowledges that certain states (e.g., California, Ohio and Georgia) have already subjected reporting agencies to a discovery accrual rule. *See* Br. at 33-34. Because TRW's successor in interest, Experian, and its credit reporting brethren do business in those states, one can assume that they have in place procedures aimed at complying with those states' discovery accrual rules.[33] Thus, affirming the "injury discovery" accrual rule here will not add significantly to the industry's data-keeping burdens. Indeed, apart from occasionally being required to defend the reasonableness of procedures in place at a given time (and, perhaps, pay damages), no substantial, additional financial burdens would befall reporting agencies if this Court were to apply the "injury discovery" accrual rule here or otherwise affirm the judgment below.[34]

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[32] The Internet routinely records plunging, easily affordable prices for a "terabyte" (1,000,000,000,000 bytes) of data storage. *See, e.g.*, Press Release, Business Wire, Snap Appliances Announces Terabyte-class Storage Appliance at CeBIT (Mar. 19, 2001), at http://biz.yahoo.com/bw/010319/0219.html (last visited May 26, 2001).

[33] As TRW noted in its brief, its former credit reporting division continues to operate under new ownership *sub nom.* Experian Information Solutions, Inc, having been sold by TRW in 1996. Br. at 2 n.2. Experian is surely the real party in interest here – with or without its fellow credit reporting titans.

[34] Even if one assumes that it will cost reporting agencies materially more money to start complying with FCRA and occasionally defend themselves for allegedly failing to do so, that is seemingly what Congress desired. When enacting FCRA, Congress expressed the need for "reporting agencies [to] exercise their *grave responsibilities* with fairness . . . and a respect for the consumer's right to privacy. 15 U.S.C.

(Cont'd)

Second, TRW fears that applying the "injury discovery" accrual rule to Section 618 will upset the delicate balance struck by Congress, and significantly "increase[] the risk of litigating stale claims." *See* Br. at 29-30. TRW thus implies that reporting agencies and federal courts will be overtaxed by cases in which the relevant facts are unduly obscured by time. In other contexts, however, members of this Court have recognized that any court may, in the very rare case where warranted, find gross laches to bar an ancient and problematic claim, even if the plaintiff is guilty of no inexcusable delay.[35] Thus, in an extremely tardy case (i.e., where tremendous prejudice befalls the defendant or the court system), gross laches will trump the "injury discovery" accrual rule. TRW's fear of the truly ancient case is therefore unfounded. Here, specifically, no laches can be found – gross or otherwise. Indeed, TRW did not even mention laches among the eight affirmative defenses set forth in its Answer filed in the district court. *See* JA 29-31. Surely, the omission is because Andrews can be faulted for no unreasonable delay, and TRW can claim no prejudice.

(Cont'd)

§ 1681(a)(4) (*see* JA 32). Moreover, Congress' stated purpose in enacting FCRA was to require reporting agencies to function "in a manner which is fair and *equitable* to the consumer, with regard to the *confidentiality* . . . and proper utilization of" credit histories. 15 U.S.C. § 1681(b) (emphasis added) (reprinted at JA 32-33).

[35] *See, e.g., County of Oneida, New York v. Oneida Indian Nation*, 470 U.S. 226, 266 (1985) (Stevens, J., concurring and dissenting) (joined by then Justice Rehnquist) (discussing gross laches findings in truly ancient cases); *see also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 378-79 (1991) (Kennedy, J., dissenting) (joined by Justice O'Connor) (discussing the possibility that, in "the extreme case," a finding of gross laches could trump the tolling principle, and concluding that a "3-year absolute bar . . . simply tips the scale too far in favor of wrongdoers").

CONCLUSION

For all of the reasons set forth above, Andrews respectfully requests that this Court affirm the judgment of the Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

TRW INC.,

Petitioner,

v.

ADELAIDE ANDREWS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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85 PP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE LANGUAGE OF SECTION 618 EXPRESSES THE TRADITIONAL COMMENCEMENT RULE, NOT A GENERAL DISCOVERY RULE. 1

II. THE MISREPRESENTATION EXCEPTION ALSO SUPPORTS THE TRADITIONAL COMMENCEMENT RULE. 5

III. THE POLICY ARGUMENTS OF RESPONDENT AND THE GOVERNMENT ARE IRRELEVANT AND UNPERSUASIVE. 11

IV. NEITHER RESPONDENT NOR HER *AMICI* DEFEND THE PRESUMPTION APPLIED BY THE NINTH CIRCUIT. 17

V. RESPONDENT'S ACTUAL DAMAGES ARGUMENT IS NOT PROPERLY BEFORE THIS COURT AND, IN ANY EVENT, WITHOUT MERIT. 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Akutowicz v. United States, 859 F.2d 1122 (2d Cir. 1988) 10
Amoco Prod. Co. v. Village of Gambell, Alaska, 480 U.S. 531 (1987) 4
Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp., 522 U.S. 192 (1997) 2
Bergman v. United States, 751 F.2d 314 (10th Cir. 1984) 10
Birdsall v. Coolidge, 93 U.S. (3 Otto) 64 (1876) 19
Bowyer v. United States Dep't of Air Force, 875 F.2d 632 (7th Cir. 1989) 10
Brown v. Gardner, 513 U.S. 115 (1994) 2
Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945) . . . 12
Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 121 S. Ct. 1678 (2001) 19
Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995) 11
Englerius v. Veterans Admin., 837 F.2d 895 (9th Cir. 1988) 10
Estate of Cowart v. Nickles Drilling Co., 505 U.S. 469 (1992) 11
Jamison v. Encarnacion, 281 U.S. 635 (1930) 3
Jenkins v. Anderson, 447 U.S. 231 (1980) 18
Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) 18
McMahon v. United States, 342 U.S. 25 (1951) 3
Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) 12
Metro. Stevedore Co. v. Rambo, 515 U.S. 291 (1995) . . . 11
Owens-Illinois, Inc. v. Armstrong, 604 A.2d 47 (Md. 1992) 3, 5
Rawlings v. Ray, 312 U.S. 96 (1941) 2
Rodriguez v. United States, 480 U.S. 522 (1987) . . . 11, 12
Rotella v. Wood, 528 U.S. 549 (2000) 17, 18
Tijerina v. Walters, 821 F.2d 789 (D.C. Cir. 1987) 10

TABLE OF AUTHORITIES (continued)

Page

United States v. Beggerly, 524 U.S. 38 (1998) 6
United States v. Brockamp, 519 U.S. 347 (1997) 6
United States v. Kubrick, 444 U.S. 111 (1979) 4, 18
Urie v. Thompson, 337 U.S. 163 (1949) 4
West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991) 13
Wilson v. Garcia, 471 U.S. 261 (1985) 12
Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) 17, 18

STATUTES

Privacy Act, 5 U.S.C. § 552a 9, 10
Fair Credit Reporting Act,
  Pub. L. No. 91-508, § 609, 84 Stat. 1131 13
  15 U.S.C. § 1681b 10
  15 U.S.C. § 1681d 10
  15 U.S.C. § 1681g 12
  15 U.S.C. § 1681m 8, 10
  15 U.S.C. § 1681o 10
  15 U.S.C. § 1681p 1, 7
18 U.S.C. § 1028 15
Cal. Civ. Code § 1875.33 16
Conn. Gen. Stat. § 52-571h 15
Ga. Code Ann. § 10-1-393 16
Ohio Rev. Code § 3904.13 16
Ohio Rev. Code § 3904.17 16

MISCELLANEOUS

Black's Law Dictionary (6th ed. 1990) 3, 19
II Calvin C. Corman, *Limitation of Actions* § 11.1.1 (1991) 2
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TABLE OF AUTHORITIES (continued)

Page

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Webster's Third New Int'l Dictionary (unabridged ed. 1976) 2

REPLY BRIEF FOR PETITIONER

Petitioner demonstrated in its opening brief that the statute of limitations in Section 618 of the Fair Credit Reporting Act, 15 U.S.C. § 1681p, incorporates the traditional commencement rule rather than the discovery rule applied below by the Ninth Circuit. This conclusion is dictated by the language of Section 618 and is confirmed by the section's misrepresentation exception, the overall structure of the FCRA, and the Act's history. In addition, as the opening brief also showed, the strong presumption in favor of the discovery rule employed by the Ninth Circuit in departing from the traditional commencement rule is without foundation and, in any event, is rebutted by the text, structure, and history of Section 618. Neither respondent nor her *amici* casts any reasonable doubt upon these points.

I. THE LANGUAGE OF SECTION 618 EXPRESSES THE TRADITIONAL COMMENCEMENT RULE, NOT A GENERAL DISCOVERY RULE.

Over the last two decades, a half dozen federal courts of appeals decisions, a dozen district court decisions, and a number of commentators have all concluded that Section 618 incorporates the traditional commencement rule starting the statute of limitations when the formal right to sue under the Act attaches. *See* Pet. Br. at 12-13 nn.4-7. As the opening brief demonstrated, these decisions reflect the language of Section 618, which expresses the traditional commencement rule, *id.* at 14-16, and the decisions of this Court interpreting statutes with similar language, *id.* at 16-17. Neither respondent nor her *amici* has an answer to this demonstration.

1. Respondent's interpretation of the language of Section 618 focuses, as it should, upon the meaning of the word "arise" in the portion of the section's statute of limitations stating the general commencement rule. Contrary to respondent's contention, however, that word expresses the traditional rule, not a discovery rule.

As respondent acknowledges, Resp. Br. at 22, the word "arise" means to "come[] into existence" or to "originate." 1 *The Oxford English Dictionary* 629 (2d ed. 1989); *see also The American Heritage Dictionary* 96 (4th ed. 2000) (defining "arise" to mean "[t]o come into being; originate"); *The Random House Dictionary of the English Language* 80 (unabridged ed. 1973) ("to come into being" or to "originate"); *Webster's Third New Int'l Dictionary* 117 (unabridged ed. 1976) ("to come into being" or to "come about"). If "arise" is understood in this common and ordinary sense, Section 618's statute of limitations is naturally and easily read to begin running upon "the date liability originates or comes into existence." As this Court has observed, under the traditional commencement rule, the statute of limitations begins to run when the plaintiff has a "complete and present cause of action." *Rawlings v. Ray*, 312 U.S. 96, 98 (1941); *see generally* II Calvin C. Corman, *Limitation of Actions* § 11.1.1, at 134 (1991). Moreover, because a defendant's liability is the converse of a plaintiff's right to sue, *see* Gov. Br. at 13, a defendant's liability comes into existence when a plaintiff's right of action becomes complete. *See id.*; *accord* Resp. Br. at 37 n.26. Thus, as respondent concedes, *see* Resp. Br. at 22, if "arise" is understood to mean to come into existence, Section 618 expresses the traditional commencement rule.

Noting that the word "arise" can also mean "to spring up," "to come into . . . notice," or to "present itself," 1 *The Oxford English Dictionary* at 629, respondent contends that the language of Section 618 expresses a generally applicable discovery rule. Resp. Br. at 13. The meaning of statutory language is, however, "a creature not of definitional possibilities, but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). As the opening brief pointed out, Pet. Br. at 16-17, this Court has interpreted statutes of limitations commencing when a claim or cause of action "arises" to begin running when a plaintiff has a "complete and present cause of action," *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997), or upon the "date of injury," *McMahon v. United States*, 342 U.S. 25, 26 (1951). *See also Owens-Illinois, Inc. v. Armstrong*, 604 A.2d 47, 54 (Md. 1992) ("Giving the word its ordinary meaning, we believe that a cause of action arises when it first comes into existence."). The legal dictionary used by respondent recognizes this usage as well: according to the dictionary, when a statute of limitations uses the word "arise," the limitations period starts running "when [a] party has a right to apply to [a] proper tribunal for relief." *Black's Law Dictionary* 108 (6th ed. 1990); *see also Jamison v. Encarnacion*, 281 U.S. 635, 641 (1930) (noting that a defendant's "liability arises when one suffers injury as a result of any breach of duty owed to him for another").

Far from showing that the word "arise" is used in a different sense in Section 618, respondent fails to identify a single situation in which the word "arise" has been used to refer to a discovery rule. In fact, to petitioner's knowledge, respondent's application of this definition to a statute of limitations — which respondent did not urge in either the court of appeals or the district court below — is unprecedented. Thus, respondent does not even begin to show that her interpretation reflects the common, ordinary understanding of the language of Section 618.

Indeed, respondent fails to explain how a discovery rule can be culled out of Section 618 even if her definition of "arise" is used. Under that definition, the limitations period in the section would begin to run when "liability springs up, comes into notice, or presents itself." Although respondent contends that this occurs when "a plaintiff actually or constructively discovers that he has been injured," Resp. Br. at 10 (quotation omitted), she does not explain why that is so: the phrase created by her definition does not mention either plaintiff or discovery, and it refers to liability rather than injury. Thus, respondent's ability to identify an alternative definition of the word "arise" does not establish that Section 618 can validly be read to incorporate a general discovery rule.

2. In their brief in support of respondent, the United States and the Federal Trade Commission do not attempt to defend respondent's analysis of the language of Section 618. Nor, for that matter, does the Government contend that this language is naturally read to incorporate a discovery rule. Instead, it simply argues that the language "will bear that construction." Gov. Br. at 6; *see also id.* at 9-15. This argument is flawed.

In the first place, the Government's argument starts from an erroneous legal premise. In contending that Section 618 will "bear" a discovery rule and then arguing that such a rule is good policy, Gov. Br. at 9, 24, the Government assumes that the text of a statute of limitations is relevant only to the extent it permits a discovery rule and that whether the statute in fact incorporates such a rule is a matter of policy left to judicial determination in light of the purpose and structure of the statute. That is not the law. As this Court has observed, "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that the legislative purpose is expressed by the ordinary meaning of the words used." *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 548 (1987) (quotations omitted). Thus, in the absence of "strong evidence that Congress actually intended another meaning," courts must apply the natural, ordinary meaning of the language Congress enacts, whether or not that language theoretically permits alternative interpretations. *Id.*

In addition, the Government fails to show that the language of Section 618 permits a discovery rule. In arguing that it does, the Government relies on decisions construing statutes of limitations that commence when claims or causes of actions "accrue." Gov. Br. at 10-13 (discussing *United States v. Kubrick*, 444 U.S. 111 (1979), and *Urie v. Thompson*, 337 U.S. 163 (1949)). Section 618, however, uses the word "arise," not "accrue," and the two words are not interchangeable. As previously demonstrated, *see* Pet. Br. at 19-20, the word "accrue" is more elastic and, unlike "arise," can be interpreted to refer to the discovery rule. *See Owens-Illinois*, 604 A.2d at 53-54 (distinguishing between when a claim "arises" and when it "accrues"); *see also* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 16 (2d ed. 1995) ("*Arise* may refer to the onset of the underlying wrong (e.g., exposure to asbestos), whereas *accrue* may refer to the ripeness of the claim (e.g., contraction of asbestosis or discovery of the disease)."). In short, the Government's interpretation is defective as well as illegitimate.

II. THE MISREPRESENTATION EXCEPTION ALSO SUPPORTS THE TRADITIONAL COMMENCEMENT RULE.

In addition to showing that Section 618 explicitly adopts the traditional commencement rule, the opening brief showed that the misrepresentation exception is inconsistent with a general discovery rule for two separate reasons. First, an unstated general discovery rule should not be implied into the section in the face of an explicit exception to the general commencement rule itself containing an express discovery provision. *See* Pet. Br. at 21-23. Second, a general discovery rule would, as a practical matter, deprive the misrepresentation exception of any meaningful effect. *See id.* at 23-25. Respondent and her *amici* do not cast any doubt upon the first reason, which is fatal to the construction that they urge, and they fail to undermine the second one as well.

1. In arguing that the presence of the misrepresentation exception casts doubt upon the existence of a general discovery rule, petitioner relied upon the well-established interpretive principle, which this Court has recently applied to statutes of limitations, that the presence of an express exception generally precludes implication of an unstated one. *See* Pet. Br. at 21-23 (discussing *United States v. Beggerly*,

524 U.S. 38 (1998), and *United States v. Brockamp*, 519 U.S. 347, 351-52 (1997)). Unable to dispute the validity of this principle, respondent asserts that it is not absolute and does not "necessarily rule out the finding of other implied exceptions." Resp. Br. at 35. Respondent does not, however, distinguish this Court's decisions applying the principle to other statutes of limitations or otherwise explain why it is inapplicable here.[1]

Although the Government attempts to offer such an explanation, its explanation is unpersuasive. Cataloguing the differences between the equitable estoppel doctrine, the discovery rule, and equitable tolling, the Government argues that inclusion of an exception codifying the equitable estoppel doctrine does not raise an inference that Congress intended to preclude application of a general discovery rule. Gov. Br. at 15-21; *see also* Pet. Br. at 35 (explaining why equitable tolling is inapplicable here). This Court has not, however, been concerned with such doctrinal distinctions in refusing to imply exceptions into statutes of limitations in prior cases, *see, e.g.*, *Beggerly*, 524 U.S. at 48 (finding equitable tolling barred by explicit presence of discovery rule); *Brockamp*, 519 U.S. at 351-52 (finding equitable tolling barred by presence of explicit exceptions to general commencement rule), and the Government offers no reason why it should be specially concerned about those distinctions in this case.

In any event, the presence of an explicit discovery provision in the misrepresentation exception raises an inference that Congress did not intend Section 618 implicitly to incorporate a general discovery rule. Congress knows how to incorporate a discovery rule into statutes of limitations clearly and unequivocally and has done so frequently. *See* Pet. Br. at 17-19 & nn.8-10. Congress did so in the misrepresentation exception in providing that the exception would delay commencement until "after discovery by the individual of the misrepresentation." 15 U.S.C. § 1681p. As Congress did not use such language in Section 618's general commencement rule but instead used the phrase "liability arises," language that it has used in the past to *distinguish* the discovery rule from the traditional commencement rule, *see* Pet. Br. at 20, the misrepresentation exception raises a natural — and powerful — inference that Congress did not intend to incorporate a general discovery rule into Section 618.

2. In addition to showing that the misrepresentation exception with its explicit discovery provision should preclude the implication of an unstated general discovery rule, petitioner also explained that a general discovery rule would render the misrepresentation exception largely redundant. Pet. Br. at 23-25. In response, both respondent and the Government offer hypotheticals about possible residual applications of the misrepresentation exception. Neither hypothetical, however, identifies a substantial independent application for the exception, which is petitioner's point.

Respondent posits discovery of "misconduct or its ramifications" in one year and of "a willful misrepresentation material to the reporting agency's extant FCRA liability" in the next. Resp. Br. at 32-33. Petitioner has not, however, argued that a general discovery rule would, as a theoretical matter, duplicate the operation of the misrepresentation exception; it contends that such a rule would, "*[a]s a practical matter,*" operate similarly enough to deprive the exception of meaningful, independent effect. Pet. Br. at 24 (emphasis added). Because respondent's hypothetical lacks any concrete details about the injury suffered, the facts misrepresented, or their discovery, it is too abstract to undermine petitioner's pragmatic point and the interpretive inference that flows from it.

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[1] Instead, respondent launches into an attack on the "'violation occurrence' rule." Resp. Br. at 36. This is a strawman that respondent employs at several times in her brief. *See id.* at 11, 17 n.10, 20, 22-29, 35-37 & n.26, 41. As the opening brief clearly stated, however, petitioner's position is not that Section 618's statute of limitations adopts a "violation occurrence" rule, but rather that Section 618 "adopts the traditional commencement rule beginning the statute when the formal right to sue under the Act attaches." Pet. Br. at 15; *see also id.* at 16 (noting that in this case the injury was suffered and the cause of action became complete when the violation occurred). Other statements by respondent and her *amici* characterizing petitioner's arguments, describing petitioner's conduct, and depicting the credit reporting industry are similarly inaccurate and unfounded.

Although the Government's hypothetical is more concrete, it does not work either because it ignores the operation of the Act. In that hypothetical, a consumer who is denied credit based upon an inaccurate report from a credit agency asks the agency if it supplied a report, but is falsely told that the agency did not do so. *See* Gov. Br. at 22. Under these circumstances, the Government contends that the statute of limitations would begin running under a general discovery rule when the consumer learns that credit has been denied because the consumer would be "put on inquiry notice of the violation" at that time, but that the statute would not begin running under the misrepresentation exception until later when the consumer discovers that a report was in fact issued. *Id.*

In fact, however, the consumer should learn about the report at the same time that he discovers that credit has been denied, because the FCRA requires that consumers who are denied credit based upon a report be notified of the denial *and* of the identity of the credit reporting agency. *See* 15 U.S.C. § 1681m(a)(1) (requiring disclosure of adverse action); *id.* § 1681m(a)(2) (requiring disclosure of identity of the agency furnishing report on which adverse action based). The Government does not explain why the misrepresentation exception would apply in that situation or, if so, why it would operate differently there than the discovery rule. Even more importantly, the Government also fails to explain how in such a situation the misrepresentation exception would serve any function intended by Congress. Thus, the Government's hypothetical fails to show that the misrepresentation exception has any meaningful role to play in the presence of a general discovery rule.

It is, of course, possible that, with more time and reflection, either respondent or the Government might come up with a concrete hypothetical in which the misrepresentation exception plays a meaningful role despite the presence of a general discovery rule. If, however, neither respondent nor the Federal Trade Commission, the agency primarily responsible for enforcing the FCRA, can easily identify such a situation, such situations must be relatively anomalous and therefore unlikely to have prompted Congress to include the exception. In any event, even if respondent could point to some meaningful role that the misrepresentation exception would play despite a general discovery rule, that fact would not affect the basic textual point that the express inclusion of a discovery provision in the exception undermines any suggestion that language adopted at the same time, in the same amendment implicitly incorporates a general discovery rule.

3. In arguing that the language of Section 618 is compatible with a general discovery rule, respondent and the Government both rely upon appellate decisions construing the Privacy Act, 5 U.S.C. § 552a. Resp. Br. at 37-39; Gov. Br. at 13-15. This reliance is misplaced.

Neither respondent nor the Government explains why this Court should look to cases under the Privacy Act, rather than the numerous cases and commentators considering Section 618 and concluding that it generally applies the traditional commencement rule. *See* Pet. Br. at 12-13 nn.4-7. These latter authorities reflect the breadth and depth of legal opinion that formed the previously settled understanding of Section 618 for the better part of two decades and that was left undisturbed (and thereby embraced) when Congress reworked the FCRA in 1996. *See id.* at 39-40. If this Court is to rely upon authority, this is the proper authority.

In any event, the Privacy Act cases cited by respondent and the Government are unpersuasive. None of them explain how a discovery rule can be culled out of the language of that statute. In all but one, there is no analysis of the text; instead, they simply declare that they are applying the discovery rule in the absence of any apparent objection by the Government. *See Bowyer v. United States Dep't of Air Force*, 875 F.2d 632, 636 (7th Cir. 1989); *Akutowicz v. United States*, 859 F.2d 1122, 11265 (2d Cir. 1988); *Englerius v. Veterans Admin.*, 837 F.2d 895, 898 (9th Cir. 1988); *Bergman v. United States*, 751 F.2d 314, 316 (10th Cir. 1984). Moreover, the remaining decision considered only whether a discovery rule would render the misrepresentation exception in the Privacy Act's statute of limitations superfluous. *See Tijerina v. Walters*, 821 F.2d 789, 798 (D.C. Cir. 1987). And the decision's contrary conclusion is irrelevant here, because it was based upon the theoretical differences between the discovery rule and the misrepresentation exception there rather than their practical operation in the context of the Privacy Act, *see id.*, which in any event differs materially from the FCRA in its notice, access, and remedial provisions. *Compare* 5 U.S.C. §§ 552a(b), (d) & (g) *with* 15 U.S.C. §§ 1681b, 1681d & 1681m-1681o. Similarly, policy arguments concerning the difficulty of discovering violations of the Privacy Act (*see Englerius*, 837 F.2d at 897; *Tijerna*, 821 F.2d at 797-98) are inapposite here because of the differences in the notice and access provisions of the two statutes. For these reasons as well, the lower court decisions construing the Privacy Act provide no basis for ignoring the language of Section 618 and the cases construing it.

III. THE POLICY ARGUMENTS OF RESPONDENT AND THE GOVERNMENT ARE IRRELEVANT AND UNPERSUASIVE.

The Government contends that a general discovery rule should be implied into Section 618 based upon its reading of

the purposes of that section and related policies. Gov. Br. at 24-30. It does not, however, contend that the ordinary meaning of the statute's language violates the clear intention of Congress or leads to a patent absurdity. Instead, assuming that this language can be read to incorporate a general discovery rule, the Government argues that such a rule would best serve the statute's purposes and policies. As that assumption is false, these arguments are irrelevant. Moreover, even considered on their own merits, the Government's arguments are unpersuasive because, among other things, they ignore the structure and history of the Act.

1. As this Court has repeatedly observed, "'[w]hen a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.'" *Metro. Stevedore Co. v. Rambo*, 515 U.S. 291, 295 (1995) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). Accordingly, where, as here, "the text alone yields a clear answer," this Court has been "reluctant to indulge an argument based on legislative purpose." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 81 (1995); *see generally Rodriguez v. United States*, 480 U.S. 522, 526 (1987). Such forbearance is especially appropriate here, because there is no suggestion of any extraordinary circumstances justifying disregard of the statute's language, and because the legislative history shows that Congress specifically considered the proper commencement rule for Section 618 — and rejected a proposal for a discovery rule in so doing. *See* Pet. Br. at 35-39. Thus, the ordinary meaning of the language of Section 618 controls.

2. In any event, the policy arguments offered by the Government are unpersuasive.

a. The Government's policy arguments ignore relevant policies. Contending that Congress' goal of "encourag[ing] the prompt presentation of claims" would not be served by commencing Section 618's limitations period before a plaintiff suspects injury, the Government asserts that the discovery rule would serve the purposes of the statute. Gov. Br. at 25-30. That goal is not, however, Section 618's only goal. To the contrary, as petitioner pointed out, Pet. Br. at 29-30, statutes of limitations are also intended to serve the interests of defendants and the public in avoiding the litigation of stale claims and the interests of defendants in certainty and peace of mind. *See, e.g., Wilson v. Garcia*, 471 U.S. 261, 271 (1985); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). As it "frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law," *Rodriguez*, 480 U.S. at 526 (emphasis omitted); *see also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261-62 (1993) (noting that a statute cannot be interpreted based upon "vague notions of [the] statute's 'basic purpose'"), the Government's one-sided policy argument is inadequate.

b. In addition, the Government ignores Section 609 of the FCRA, even though petitioner's brief showed (Pet. Br. at 31-32) that the section is inconsistent with any suggestion that Congress intended to permit improper disclosure claims to be brought more than two years after discovery of the disclosure.

Section 609 gives consumers the right to learn who has received their credit reports, *see* 15 U.S.C. § 1681g(a)(3), a right that is normally essential to bringing improper disclosure claims because of the inherent difficulty of discovering such disclosures. This right does not, however, extend for an indefinite period of time. To the contrary, as the opening brief pointed out, Pet. Br. at 32, Section 609 generally requires credit reporting agencies to identify recipients of reports only for the "1-year period preceding the date on which the [consumer's] request is made." 15 U.S.C. § 1681g(a)(3)(ii); *see also id.* § 1681g(a)(3)(i) (two-year period for reports requested for employment purposes). Moreover, when the FCRA was passed, agencies were generally required to

disclose recipients going back only six months. *See* FCRA, Pub. L. No. 91-508, § 609, 84 Stat. 1131. As these restrictions effectively prevent many (if not most) plaintiffs who do not request access to their files within a year or two of disclosure from bringing improper disclosure claims, they are inconsistent with a general discovery rule presumably intended to allow such claims to be brought within two years after discovery of disclosure.

In fact, Section 609 casts serious doubt upon any claim that Congress intended to incorporate a general discovery rule into Section 618. As the Government acknowledges, Gov. Br. at 27, the notice and access provisions in the FCRA help to ensure that consumers discover any injuries suffered as a result of an inaccuracy in a credit report as well as any injuries suffered as the result of the disclosure of an investigative consumer report. *See* Pet. Br. at 26-28. Consequently, a general discovery rule would apply primarily to improper disclosure claims (and, indeed, to improper disclosure claims dealing with ordinary, rather than investigative, consumer reports). As Section 609 undermines the ability of consumers to bring such claims more than two years after disclosure, it also undermines any suggestion that Congress intended to incorporate a general discovery rule into Section 618. Moreover, because the "best evidence of [congressional] purpose is the statutory text adopted by both Houses of Congress and submitted to the President," *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 98 (1991), Section 609 offers more significant evidence of Congress' purposes than any of the Government's arguments.

c. The Government's reliance upon the identity theft problem (Gov. Br. at 29) is misplaced.

First, as both respondent and the Government note, Gov. Br. at 29; Resp. Br. at 2, the issue of identity theft only became prominent in the last decade. *See, e.g.*, Fed. Trade Comm'n, *ID Theft: When Bad Things Happen To Your Good Name* 2

(Aug. 2000) [hereinafter, *ID Theft*]. It therefore cannot fairly be said that Congress was concerned with identity theft in 1970, when Section 618 was enacted. Moreover, if Congress had intended Section 618 to deal with identity theft, it could have amended the Act to do so in 1996 when the Act was overhauled. *See* Pet. Br. at 39-40.

Second, a general discovery rule is not needed to deal with the identity theft problem. When an imposter poses as a consumer, he typically obtains and then abuses credit, leaving the consumer to deal with the fallout. As a consequence, consumers victimized by identity theft are often denied credit as a result of the thief's activities or are hounded by bill collectors seeking payments evaded by the imposter. *See* Resp. Br. at 3. For example, in this case, respondent (allegedly) was denied a loan in late May 1995, Pet. App. 18a, and in October of that year, she was contacted by two collection agencies seeking to collect on separate debts due from the imposter who assumed her identity. Resp. Br. at 5, 7; ER 75, 138. Thus, a market mechanism ensures consumers will discover identity theft and thereby receive notice of any improper disclosure claims they may have under the FCRA.

No doubt anticipating this argument, the Government asserts, based upon data assembled by the Federal Trade Commission, that more than 25% of the victims of identity theft take more than a year to discover the theft. Gov. Br. at 29. That same data, however, also shows that approximately 35% of the victims of identity theft discover the theft within a month, that another 30% do so in the next five months, and that over 80% of the victims learn of thefts by the end of two years. *See* Fed. Trade Comm'n, *Identity Theft Complaint Data: Figures and Trends November 1999 through March 2001*, Figure 8, *available at* http://www.consumer.gov/idtheft/charts/nov99-mar01.pdf (last visited June 27, 2001). Thus, if the Government's figures are correct, the vast majority of identity theft victims receive

notice of their injuries long before the statute of limitations expires under a traditional commencement rule.

Third, it is neither necessary nor appropriate to distort the language of the FCRA to deal with the problem of identity theft. The primary means of dealing with that problem is not private lawsuits against credit reporting agencies; it is actions, either civil or criminal, against identity thieves. *See, e.g.*, 18 U.S.C. § 1028 (criminal); Conn. Gen. Stat. § 52-571h (civil). Moreover, because identity theft is currently the subject of legislation at both the state and federal levels, *see ID Theft* at 10-12, the problem is best left to legislatures to remedy.

3. Respondent does not contend that policy considerations demand a general discovery rule. Instead, she argues more modestly that policy supports her interpretation of the text of Section 618. Resp. Br. at 40-46. Even these limited arguments are, however, unpersuasive.

a. In addition to echoing the Government's concerns over identity theft and improper disclosures, respondent objects that the FCRA's notice and access provisions do not afford consumers enough time to bring their claims because, according to her, a consumer typically needs two years to prepare a FCRA suit. Resp. Br. at 41-43. At trial, however, respondent revealed that she filed suit within two months after contacting counsel. *See* Trial Tr. 52, 1955 (noting contact in August 1996 and filing in October 1996). As respondent fails to explain why a typical counsel would need much longer than that, her conclusory assertions concerning the time needed to bring a suit deserve no weight.

b. Respondent similarly errs in disputing petitioner's demonstration that a discovery rule would not impose a significant burden upon the credit reporting industry because the costs of data storage are "plummeting." Resp. Br. at 44-45 & n.32. In the first place, storage costs are not the only costs imposed by a discovery rule. As the opening brief pointed out, a general discovery rule would undermine the ability of potential defendants to project their potential liabilities and require them to litigate claims that have grown stale. Pet. Br. at 29-31, 41-42. In addition, discovery rules impose transaction costs upon defendants and courts alike because they require resolution of often nettlesome questions over when injuries should have been discovered. *See id.* at 42. Finally, even if respondent's claims about the cost of data storage were substantiated by more than a press release, it would not follow that a general discovery rule would have no impact on credit reporting agencies. Given the sheer volume of information stored and processed by credit agencies — hundreds of millions of consumer credit files, more than half a billion reports each year, and more than two billion pieces of information each month, *see id.* at 30-31 — even a tiny per unit increase in the cost of data storage would cost the industry millions of dollars a year.

c. Respondent also asserts that incorporating a general discovery rule into Section 618 would not significantly add to the credit industry's burdens, because statutes dealing with credit reporting in California, Georgia, and Ohio have limitations periods incorporating the rule that already compel the necessary data storage. *See* Resp. Br. at 45. The California statute, however, sets an outside limit on the age of suits brought under it that would not be present under either of respondent's readings of Section 618, *see* Cal. Civ. Code § 1785.33 (requiring suits to be brought "not more than seven years from the earliest date on which liability could have arisen"), and the other statutes impose only limited obligations in connection with either willful violations, *see* Ga. Code Ann. § 10-1-393(b)(29), or insurance transactions, *see* Ohio Rev. Code §§ 3904.13, 3904.21(B). Thus, these limited provisions do not have the same import that the sweeping and unlimited discovery rule urged by respondent would have, and, like the rest of the policy arguments advanced by respondent and the

Government, they cannot justify departure from the plain and ordinary meaning of the language of Section 618.

IV. NEITHER RESPONDENT NOR HER *AMICI* DEFEND THE PRESUMPTION APPLIED BY THE NINTH CIRCUIT.

As the opening brief demonstrated, the strong presumption that the Ninth Circuit used in implying a general discovery rule into Section 618 has no basis in the decisions of this Court, which have not applied any presumption in favor of a discovery rule to statute of limitations that contains an explicit commencement provision. Pet. Br. at 40-45. As also demonstrated, such a presumption makes no sense in light of Congress' repeated practice of including explicit discovery provisions in statutes as well as the uncertainty about how a discovery rule would affect the balance between protecting valid claims and enabling repose struck in particular statutes of limitations. *Id.* at 41-42. Neither respondent nor her *amici* attempt to defend the Ninth Circuit's presumption, or any other presumption in favor of the discovery rule, against these objections. Indeed, the Government appears to reject the presumption. Gov. Br. at 11 n.3 (recognizing the traditional rule as the "standard" one "in most circumstances") (quotation omitted).[2]

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[2] Respondent does assert that the discovery rule applies beyond the realm of bodily injuries and medical malpractice, where "the cry for a discovery rule is loudest." *Rotella v. Wood*, 528 U.S. 549, 555 (2000); *accord Kubrick*, 444 U.S. at 126 (Stevens, J., dissenting). Although respondent relies upon *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), in doing so, she does not invoke the case's treatment of claims for lost future profits. Instead, noting *Zenith*'s statement that a cause of action accrues "if a plaintiff *feels* the adverse impact of an antitrust conspiracy," *Zenith*, 401 U.S. at 339 (emphasis added), respondent asserts that this Court implicitly adopted a discovery rule on the ground that a plaintiff "feels" an injury only when he "consciously suffers" it. Resp. Br. at 19-20. This is frivolous. Far from suggesting that an injury must be

V. RESPONDENT'S ACTUAL DAMAGES ARGUMENT IS NOT PROPERLY BEFORE THIS COURT AND, IN ANY EVENT, WITHOUT MERIT.

No doubt recognizing the flaws in her attempt to read a discovery rule into Section 618 and in the presumption applied by the Ninth Circuit, respondent advances a new, alternative argument in her opposition brief. While asserting that petitioner breached her "financial privacy" and that these breaches facilitated the theft of her identity, *see* Resp. Br. at 4, respondent also contends that she did not suffer any "actual damages" cognizable under the FCRA until she realized that her privacy had been invaded by the allegedly improper disclosure of her credit records. *See id.* at 22-29. This new argument is not properly before this Court and, in any event, is meritless.

Although a party that prevailed below can go beyond the question presented in defending the judgment at issue, as a general rule, this Court "will not consider a claim that was not presented to the courts below." *Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980); *see generally* Robert L. Stern *et al.*, *Supreme Court Practice* 344 (7th ed. 1993). As respondent did not advance her "actual damages" argument in either the district court or the court of appeals, this argument should not be considered here. First, respondent does not cite any lower court decisions pertinent to her argument, and petitioner is unaware of any. As a consequence, this Court lacks the

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consciously suffered to trigger the limitations period, *Zenith* states that future damages accrue "on the date they are suffered," without any reference to consciousness. *Zenith*, 401 U.S. at 339; *see also id.* at 338 (noting that a claim accrues "each time a plaintiff is injured"). Thus, as this Court has noted, *Zenith* articulates the traditional "injury occurrence" rule, not a discovery rule. *See Rotella*, 528 U.S. at 553-54 & n.2; *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 198 (1997) (Scalia, J., concurring in part and concurring in the judgment).

benefit of the views of the lower courts on this argument. Second, focusing largely on strawman arguments concerning the "violation occurrence" theory not advanced by petitioner, *see supra* p. 6 n.1, respondent ignores the real issue raised by her new argument, which is whether an invasion of privacy unknown to its victim constitutes a cognizable injury sufficient to warrant a damage award under the FCRA and therefore to start the Act's statute of limitations running. On that issue, she simply asserts in a footnote, without argument or authority, that the "unwitting victim suffers no actual damages unless and until some personal realization occurs, usually through discovery." Resp. Br. at 24 n.17. As this conclusory assertion offers no real guidance to petitioner or to the Court, this Court should decline to address it and, instead, treat respondent's actual damages argument as waived below.

In any event, the actual damages argument is without merit. As noted above, respondent contends that the allegedly improper disclosure of her credit reports breached her financial privacy, and it is hornbook law that an individual may recover damages not only for emotional distress and pecuniary harm resulting from an invasion of privacy, but also for the "harm to his interest in privacy resulting from the invasion." *Restatement (Second) of Torts* § 652H (1977).

Nor is there any reason to think that, by providing for recovery of "actual damages," Congress intended to prevent consumers from receiving compensation for such injuries under the FCRA. The term "actual damages" refers to amounts awarded to "compensate for a proven injury or loss." *Black's Law Dictionary* 394; *see also Birdsall v. Coolidge*, 93 U.S. (3 Otto) 64, 64 (1876) (interpreting "actual damages" to refer to damages resulting from "injury alleged and proved"). Thus, the term is used to distinguish compensatory damages from punitive and nominal ones, *see, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678, 1686, 1688 (2001) and, in the defamation and privacy contexts, to distinguish unproven "presumed" damages from proven ones, *see, e.g.*, 2 Rodney A. Smolla, *Law of Defamation* § 9:22, at 9-11 (2000). Consequently, the actual damages requirement does not preclude a plaintiff from seeking damages due to improper disclosure of her purchasing habits and other private financial information and therefore does not save the judgment below.

CONCLUSION

For the foregoing reasons, and those stated in petitioner's opening brief, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

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No. 00-1045

In the Supreme Court of the United States

TRW INC., PETITIONER

v.

ADELAIDE ANDREWS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the limitation period under the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, which allows private damage actions "to enforce any liability created under [the Act]" to be brought "within two years from the date on which the liability arises," begins to run at the time of an alleged violation, even if the potential plaintiff has no reason to know that she has been injured.

TABLE OF CONTENTS

Page

Statement 1

Summary of argument 6

Argument 9

- I. The language of the Fair Credit Reporting Act permits the use of a discovery rule in determing when the statutory limitation on private enforcement actions begins to run 10
  - A. Use of a discovery rule is consistent with the Act's provision that the time for suit runs from the time that "liability arises" 10
  - B. Inclusion of an express anti-concealment provision in Section 1681p does not imply a congressional intention to prohibit use of a discovery rule 15
- II. Use of a discovery rule best comports with the history, structure, and purposes of the Fair Credit Reporting Act 24

Conclusion 30

TABLE OF AUTHORITIES

Cases:

Akutowicz v. *United States*, 859 F.2d 1122 (2d Cir. 1988) 14

Associated Indem. Corp. v. *State Indus. Accident Comm'n*, 12 P.2d 1075 (Cal. Ct. App. 1932), disapproved in part on other grounds, 172 P.2d 884 (Cal. 1946) 12

Basic Inc. v. *Levinson*, 485 U.S. 224 (1988) 28

Bay Area Laundry & Dry Cleaning Pension Trust Fund v. *Ferbar Corp.*, 522 U.S. 192 (1997) 11, 14

Burnett v. *New York Cent. R.R.*, 380 U.S. 424 (1965) 25

Cada v. *Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990), cert. denied, 501 U.S. 1261 (1991) 18, 19, 20

Cases—Continued: Page

Connors v. *Hallmark & Son Coal Co.*, 935 F.2d 336 (D.C. Cir. 1991) 18, 20, 25, 26
Crown Coat Front Co. v. *United States*, 386 U.S. 503 (1967) 9, 24
Englerius v. *Veterans Admin.*, 837 F.2d 895 (9th Cir. 1988) 14
Herget v. *Central Nat'l Bank & Trust Co.*, 324 U.S. 4 (1945) 13
Herman & MacLean v. *Huddleston*, 459 U.S. 375 (1983) 21
Holmberg v. *Armbrecht*, 327 U.S. 392 (1946) 5, 14, 20, 26
Klehr v. *A.O. Smith Corp.*, 521 U.S. 179 (1997) 14, 18, 20, 24
Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350 (1991) 13
Reading Co. v. *Koons*, 271 U.S. 58 (1926) 7-8, 9, 24, 25
Rotella v. *Wood*, 528 U.S. 549 (2000) 18, 28, 29
Tijerina v. *Walters*, 821 F.2d 789 (D.C. Cir. 1987) 14, 22, 26
United States v. *Beggerly*, 524 U.S. 38 (1998) 13, 20, 27
United States v. *Brockamp*, 519 U.S. 347 (1997) ... 13, 15, 19
United States v. *Kubrick*, 444 U.S. 111 (1979) 11, 12, 14, 23, 24, 25, 30
United States v. *Lindsay*, 346 U.S. 568 (1954) 11
Urie v. *Thompson*, 337 U.S. 163 (1949) 12, 24, 26
Wolin v. *Smith Barney Inc.*, 83 F.3d 847 (7th Cir. 1996) 16, 17, 18, 19, 20, 22
Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971) 11

Statutes:

Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.* 3
  15 U.S.C. 1681b 3, 4, 6
  15 U.S.C. 1681b (1994 & Supp. V 1999) 27
  15 U.S.C. 1681e(a) 3, 5, 6, 27, 29
  15 U.S.C. 1681e(a)-(b) 9

Statutes—Continued: Page

  15 U.S.C. 1681e(b) 3, 5, 27, 29
  15 U.S.C. 1681g-1681i (1994 & Supp. V 1999) 27
  15 U.S.C. 1681i(a) 3, 5
  15 U.S.C. 1681n (1994 & Supp. V 1999) 1
  15 U.S.C. 1681n-1681*o* (1994 & Supp. V 1999) 9, 27
  15 U.S.C. 1681*o* (1994 & Supp. V 1999) 1
  15 U.S.C. 1681p (§ 618) .... *passim*
  15 U.S.C. 1681s (1994 & Supp. V 1999) 28
  15 U.S.C. 1681s(a)-(b) (1994 & Supp. V 1999) 1
Federal Employers' Liability Act, 45 U.S.C. 56 12
Federal Torts Claims Act, 28 U.S.C. 2401(b) 11
Privacy Act of 1974, 5 U.S.C. 552a (1994 & Supp. V 1999) 6
    5 U.S.C. 552a(g)(5) 7, 13, 15
26 U.S.C. 6511 15
29 U.S.C. 1113(a) 17

Miscellaneous:

2 C. Corman, *Limitation of Actions* (1991 & Supp. 1993) 16, 19-20
Note, *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177 (1950) 11
4 C. Wright & A. Miller, *Federal Practice and Procedure* (2d ed.):
    1987 & Supp. 1996 16
    Supp. 2001 .... 16, 18

In the Supreme Court of the United States

No. 00-1045

TRW INC., PETITIONER

v.

ADELAIDE ANDREWS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

The Fair Credit Reporting Act confers public enforcement authority on the Federal Trade Commission with respect to most consumer reporting agencies and others subject to the Act, and on other federal agencies or officers with respect to certain financial institutions and other specified parties. 15 U.S.C. 1681s(a)-(b) (1994 & Supp. V 1999). Private suits under 15 U.S.C. 1681n and 1681*o* (1994 & Supp. V 1999) supplement public enforcement efforts.

STATEMENT

1. In June 1993, respondent Adelaide Andrews saw a doctor in Santa Monica, California. In connection with the appointment she provided the doctor's office with personal information, including her date of birth and

social security number. A receptionist named Andrea Andrews processed that information. Pet. App. 16a.

In 1994 Andrea Andrews moved to Las Vegas. There she rented an apartment under the name "Adelaide (Andrea) Andrews," using respondent's social security number and driver's license number, and obtained telephone and electric service in respondent's name. Pet. App. 16a. She arranged for television service from Prime Cable of Las Vegas, using respondent's social security number. *Id.* at 3a, 17a. She also applied for credit at Dillard's and Express Department Stores and through companies called FCNB Preferred Charge and Commercial Credit, in each case using respondent's social security number, and in one case using respondent's date of birth as well. *Id.* at 2a-3a, 16a-17a.

The companies all requested credit reports on their prospective customer—in four cases from petitioner TRW, and in one case from former defendant Trans Union Corporation, Inc. Pet. App. 16a-17a. Petitioner or Trans Union matched the information supplied to them to the social security number, last name, and first initial associated with credit files they maintained concerning respondent, and provided the requesters with information from those files. *Id.* at 17a. They also noted the requests and disclosures in the files they maintained on respondent. *Id.* at 3a, 19a. Dillard's Department Store then extended credit to Andrea Andrews, and Prime Cable provided her with service. *Id.* at 3a, 17a-18a. Andrea eventually failed to pay what she owed to Dillard's, to Prime Cable, and to her landlord. *Id.* at 17a; Pet. Br. 6.

In May 1995 respondent inquired about refinancing the mortgage on her home, and the bank requested a credit report on her. The report combined information from petitioner's and Trans Union's files, and showed a delinquent Dillard's account in Las Vegas. Pet. App. 18a. Respondent then contacted petitioner and Trans Union to obtain copies of the files they maintained on her. When she saw that petitioner's file showed the Dillard's account and requests for credit reports by other businesses in Las Vegas, she contacted petitioner, Dillard's, and the Las Vegas police. Pet. Br. 7. At respondent's request, petitioner deleted from her file all entries that had arisen from Andrea Andrews' activities. Pet. App. 3a.

2. In October 1996 respondent sued petitioner and Trans Union under the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.* See Pet. App. 3a. She alleged that petitioner had violated 15 U.S.C. 1681b and 1681e(a) by providing reports on her "without reasonable grounds for believing that the * * * reports were to be used in connection with a credit transaction involving [respondent]." J.A. 15 (Compl. ¶ 23). She also alleged that petitioner had violated Section 1681e(b) by "fail[ing] to maintain and follow 'reasonable procedures to assure maximum possible accuracy of the information concerning' [respondent]" in their files. J.A. 16 (Compl. ¶ 28). She sought actual and punitive damages and an injunction requiring petitioner to comply with the FCRA "by 'requiring a sufficient number of corresponding points of reference' before disseminating an individual's credit history or attributing information to an individual's credit file." Pet. App. 4a (quoting Compl. ¶ 42(a), *reprinted at* J.A. 19).[1]

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[1] The complaint also alleged that Trans Union had violated 15 U.S.C. 1681i(a) by failing to respond appropriately when respondent notified it that the information in its files was inaccurate (J.A. 17), and that the defendants' violations of the FCRA justified equitable relief under California law (J.A. 18-19).

The district court granted partial summary judgment in favor of petitioner, based in part on the statute of limitations that applies to private actions under the FCRA. Pet. App. 22a-25a. The court concluded (*id.* at 25a) that the limitation period, which is generally "two years from the date on which the liability arises," 15 U.S.C. 1681p, began to run on the date that petitioner made each challenged disclosure of information about respondent. Respondent thus could not pursue any claim based on petitioner's disclosures of information to FCNB and Prime Cable, because each of those disclosures was made more than two years before respondent filed her complaint. Pet. App. 23a, 25a.

The court rejected respondent's contention that the Act should be construed to include a "discovery rule," under which the limitation period would not begin to run until respondent learned or should have learned that a disclosure had been made, and under which all of respondent's claims would have been timely. Pet. App. 23a-25a. The court pointed out that the FCRA limitation provision includes a "specific exception" (*id.* at 23a) for situations in which a defendant has "materially and willfully misrepresented" information that the Act requires it to disclose to a potential plaintiff and that is material to establishing the defendant's liability. See 15 U.S.C. 1681p. The court held that "the discovery rule does not apply to the FCRA except in the one * * * circumstance" set out in the Act. Pet. App. 23a, 25a.

The district court made various other pre-trial rulings, including that disclosure of information in connection with a credit application by someone impersonating a consumer does not violate 15 U.S.C. 1681b (Pet. App. 25a-29a), and that petitioner's general procedures for deciding what files to disclose in response to requests for credit reports, and its disclosure of respondent's files in this case, were "reasonable as a matter of law" (*id.* at 34a n.15), and did not violate 15 U.S.C. 1681e(a). See Pet. App. 29a-34a.[2] Trans Union then settled with respondent. See J.A. 5. Respondent's remaining claims against petitioner were tried to a jury, which found for petitioner. Pet. App. 5a.

3. The court of appeals reversed in part and remanded for trial on respondent's remaining claims. Pet. App. 1a-9a. The court rejected the district court's conclusion that the FCRA's limitation period began to run from the date of each disclosure of information about respondent, without regard to when respondent knew or should have known of the disclosure. *Id.* at 5a-6a. The court held that construction of the limitation provision was governed instead by "[t]he general federal rule * * * that a federal statute of limitations begins to run when a party knows or has reason to know that she was injured," because "unless Congress has expressly legislated otherwise, the equitable doctrine of discovery 'is read into every federal statute of limitations.'" *Ibid.* (quoting *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946)). The court noted (*id.* at 6a)

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[2] The district court also held that there were issues of fact with respect to respondent's claims against Trans Union under 15 U.S.C. 1681e(b) and 1681i(a) (Pet. App. 35a-45a, 45a-48a); that petitioner was entitled to judgment that the report it furnished to the bank when petitioner was considering refinancing her home had not caused her any economic damage (*id.* at 48a-51a); that petitioner was entitled to summary judgment on respondent's claim for punitive damages, but Trans Union was not (*id.* at 53a-57a); and that respondent was potentially entitled to disgorgement of profits under state law (*id.* at 52a-53a), and to injunctive relief against Trans Union but not against petitioner, which was no longer engaged in the credit reporting business (*id.* at 57a-64a).

that it had "followed this approach in interpreting an analogous statute," the Privacy Act of 1974, 5 U.S.C. 552a (1994 & Supp. V 1999). Applying the discovery rule, none of respondent's claims was time-barred. Pet. App. 6a.

The court also held that petitioner's disclosures of respondent's information in response to requests generated by Andrea Andrews' activities violated Section 1681b, and that the jury should have been allowed to consider whether petitioner's procedures for deciding to make such disclosures were nonetheless reasonable enough to insulate petitioner from liability under Section 1681e(a). See Pet. App. 6a-8a. The court affirmed the judgment entered for petitioner on those claims that had been tried, and remanded the case for trial of respondent's remaining claims. *Id.* at 8a-9a.

SUMMARY OF ARGUMENT

A credit reporting agency may become subject to private civil liability under the FCRA by failing to follow reasonable procedures to assure that the information it maintains is accurate, and that information is disclosed to third parties only as permitted by the Act. When a report containing inaccurate information is released, however, or information concerning a consumer is inappropriately disclosed, considerable time often elapses before the affected consumer has any reason to learn of the violation. The issue is whether, in light of this circumstance, the Act's two-year statute of limitations should begin to run only once the potential plaintiff knows or should know that she has been harmed.

The first question to be addressed is whether the language of the Act will bear that construction. Under 15 U.S.C. 1681p, a private action must be brought "within two years from the date on which the liability arises." This Court has endorsed the use of a "discovery rule," under otherwise appropriate circumstances, when a limitation period runs from the time a "claim" or "cause of action" "accrues." Courts of appeals have also applied the rule under the very similar limitation provision in the Privacy Act, which requires that an action "to enforce any liability created under" that Act be brought "within two years from the date on which the cause of action arises." 5 U.S.C. 552a(g)(5). The "liability arises" language of Section 1681p does not differ from the language in those other provisions in any way that precludes the use of a discovery rule.

That conclusion does not change because Section 1681p—like the Privacy Act—includes an express anti-concealment provision. That provision is not, as petitioner contends, simply a "limited discovery rule." It incorporates a version of the judicial doctrine of "equitable estoppel," which is distinct both from the discovery rule and from the related doctrine of equitable tolling. Because each principle has its own domain, and because the circumstances under which FCRA claims typically arise strongly support the use of a discovery rule, Congress's inclusion of an express version of one principle does not compel the conclusion that it intended to exclude application of the others. Nor would the use of a discovery rule render the express provision "superfluous."

Because the text of the Act neither requires nor precludes use of a discovery rule, the question becomes how the limitation provision is best interpreted, "in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought." *Reading*

Co. v. *Koons*, 271 U.S. 58, 62 (1926). A primary purpose of limitations—to encourage the prompt presentation of claims—is not implicated until events may fairly be expected to put a potential plaintiff on notice of the need for diligence in discovering and presenting the claim. Accordingly, this Court has applied the discovery rule to cases involving medical malpractice and latent occupational injuries—cases in which potential plaintiffs often will not learn of their injuries until some time after they have been inflicted. The FCRA, like the Privacy Act, fits that model.

That conclusion is consistent with Congress's selection of a relatively short limitation period, and with the history and structure of the Act. Although Congress expected potential plaintiffs to be diligent in pursuing *suspected* claims, there is no reason to think that it intended to impose a limitation period that would begin to run against claims that even a diligent consumer had no reason to suspect. Moreover, because enforcement of the Act's provisions relies to a significant extent on private litigation, use of a discovery rule serves the public interest, as well as the interests of private litigants. Such a rule strikes the proper balance between potential defendants' legitimate interest in repose, and the private and public interests in ensuring that potential plaintiffs have a fair opportunity to discover and present claims under the Act.

ARGUMENT

The Fair Credit Reporting Act requires, among other things, that credit reporting agencies maintain reasonable procedures both to assure "maximum possible accuracy" of the information in their consumer credit files and to avoid releasing that information to any third party except as specifically permitted by the Act. 15 U.S.C. 1681e(a)-(b). Those obligations are enforced in large part through private damage suits under the Act. 15 U.S.C. 1681n-1681*o* (1994 & Supp. V 1999). The Act operates in a context, however, in which an individual will frequently have no immediate reason to know if a credit report containing inaccurate information has been released, or if a report is released to an unauthorized person or for an unauthorized purpose. The question presented here is whether, in that unusual statutory context, the Act's two-year statute of limitations on private enforcement actions should begin to run only once the potential plaintiff becomes (or should become) aware that she has suffered some injury.

In answering that question, the first inquiry is whether the language of the Act will permit such a construction. If it will, then the question becomes whether that is the best interpretation of the Act, "in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought." *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 517 (1967) (quoting *Reading Co.* v. *Koons*, 271 U.S. 58, 62 (1926)).

I. THE LANGUAGE OF THE FAIR CREDIT REPORTING ACT PERMITS THE USE OF A DISCOVERY RULE IN DETERMINING WHEN THE STATUTORY LIMITATION ON PRIVATE ENFORCEMENT ACTIONS BEGINS TO RUN

A. Use Of A Discovery Rule Is Consistent With The Act's Provision That The Time For Suit Runs From The Time That "Liability Arises"

Section 618 of the Act, 15 U.S.C. 1681p, provides that:

> An action to enforce any liability created under this [Act] may be brought * * * within two years from the date on which the liability arises, except that where a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this subchapter, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

That language does not foreclose the use of a discovery rule, under which a "liability" under the Act would first "arise[]," so as to start the running of the limitation period, when a potential plaintiff first learns (or with due diligence should learn) that she has been injured by the conduct of a potential defendant.

This Court has not previously interpreted a statute of limitations that uses the particular "liability arises" language that is found in Section 1681p. The Court has, however, held that where it is otherwise appropriate, a discovery rule is compatible with similar language under which a limitation period begins to run when a

"claim" or a "cause of action" "accrues." In *United States* v. *Kubrick*, 444 U.S. 111, 113, 119-122 (1979), the Court rejected the argument that a "claim" for medical malpractice under the Federal Tort Claims Act "accrue[d]," under the applicable statute of limitations, 28 U.S.C. 2401(b), only when the plaintiff learned that he might be entitled to *legal relief* for his injury. The Court concluded that such a generous rule would unduly undermine the purposes of the Act's limitation provision. 444 U.S. at 123. The Court endorsed, however, the rule that a malpractice "claim 'accrues' within the meaning of the [FTCA] when the plaintiff knows both the existence and the cause of his injury." *Id.* at 113; see *id.* at 122. Thus, the statute of limitations on Kubrick's claim began to run when he learned that his loss of hearing was probably caused by earlier treatment with an antibiotic—neither earlier, at the time of the treatment itself, nor later, when Kubrick was first told that the treatment had been improper. *Id.* at 113-114, 118-123. That rule, the Court concluded, properly balanced the interests in fairness and repose in the malpractice context.[3]

In first interpreting the FTCA's limitation provision to include a discovery rule for malpractice cases, lower federal courts relied on this Court's decision in *Urie* v. *Thompson*, 337 U.S. 163, 168-171 (1949). See *Kubrick*, 444 U.S. at 120 n.7. *Urie* involved an action under the Federal Employers' Liability Act by a plaintiff who sought compensation for the disabling effects of long-term exposure to silica dust at work. 337 U.S. at 165-166. The Court held that the employee's "cause of action" did not "accrue[]" for purposes of the FELA's limitation provision, 45 U.S.C. 56, until he became disabled and was diagnosed with silicosis. 337 U.S. at 168-171.

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[3] By contrast, the "standard rule" in most circumstances is that "the limitations period commences when the plaintiff has 'a complete and present cause of action,'" *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp.*, 522 U.S. 192, 201 (1997), which normally occurs once all the elements giving rise to the cause of action have come into existence, see Note, *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1200-1201 (1950). See also *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338-342 (1971); *United States* v. *Lindsay*, 346 U.S. 568, 569 (1954) ("In common parlance a right accrues when it comes into existence[.]").

The Court rejected the argument that because Urie "must unwittingly have contracted silicosis long before" it disabled him, his cause of action must have "accrued" at that time. 337 U.S. at 169. The Court concluded that in framing a "humane legislative plan" such as the FELA, Congress would not have "intended such consequences to attach to blameless ignorance." *Id.* at 170. Moreover, a holding that the limitation period began to run before the employee had any reason to know he had been injured would be inconsistent with "the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after *notice* of the invasion of legal rights." *Ibid.* (emphasis added). Instead, the Court agreed with the statutory construction adopted by a state court in an analogous workers' compensation case, under which "the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves." *Ibid.* (quoting *Associated Indemnity Corp.* v. *State Indus. Accident Comm'n*, 12 P.2d 1075, 1076 (Cal. Ct. App. 1932), disapproved in part on other grounds, *Colonial Ins. Co.* v. *Industrial Accident Comm'n*, 172 P.2d 884 (Cal. 1946)).

Although the "liability arises" language used in Section 1681p is not the same as that construed in *Urie* and *Kubrick*, it does not differ in any way that precludes the use of a discovery rule.[4] To the contrary, because the legal rights that may be vindicated through litigation are inversely related to legal duties subject to judicial enforcement, one would normally expect a potential defendant's legal "liability" to "arise," at least for purposes of a statute of limitations, at the same time that the potential plaintiff's "claim" or "cause of action" "accrues." That expectation is reenforced in this case by the first phrase of Section 1681p, which refers to the plaintiff's potential action not as a "claim" or a "cause of action," but as "[a]n action to enforce any liability created under" the Act. Similarly, the Section's express anti-concealment provision applies, by its terms, when misrepresented information is "material to the establishment of the defendant's liability" to a potential plaintiff. Thus, in drafting Section 1681p, Congress simply spoke consistently in terms of legal "liability" rather than in terms of a legal "claim" or "cause of action."

It is instructive to compare the language of Section 1681p with the very similar limitation provision in the Privacy Act of 1974, 5 U.S.C. 552a(g)(5). That provision also refers to actions "to enforce any liability created under" the Act, and includes a concealment provision that refers to establishment of the defendant's "liability." While the limitation period under the Privacy Act runs from the date on which the cause of action arises, rather than the date on which the *liability* arises, as in the FCRA, there is no reason to suspect that Congress attached significance to that difference in phraseology. To the contrary, the use of the different phrases in otherwise directly comparable provisions strongly suggests that Congress viewed the terms as interchangeable. Cf. *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp.*, 522 U.S. 192, 201 (1997) (construing statute that speaks in terms of when a "cause of action" "arose"); *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946) (not reaching question "[w]hen the liability, if any, accrued in this case"). As the court below in this case noted (Pet. App. 6a), courts of appeals have uniformly construed the Privacy Act limitation provision to incorporate a discovery rule. See *Englerius* v. *Veterans Admin.*, 837 F.2d 895, 898 (9th Cir. 1988) (citing cases); *Tijerina* v. *Walters*, 821 F.2d 789, 797-798 (D.C. Cir. 1987); see also *Akutowicz* v. *United States*, 859 F.2d 1122, 1126 (2d Cir. 1988). The United States has long acquisced in that holding.

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[4] There are some statutes whose language in context leaves little doubt about when a limitation period begins to run, or that the only applicable discovery rule is one expressed in the text. See *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998); *United States* v. *Brockamp*, 519 U.S. 347, 350-352 (1997) ("unusually emphatic" and detailed language concerning date tax return was filed or tax was paid excluded even equitable tolling); *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 360 & n.6, 362 n.8, 363 (1991); *Herget* v. *Central Nat'l Bank & Trust Co.*, 324 U.S. 4 (1945). This is not such a case.

Thus, under this Court's cases, the language of Section 1681p neither compels nor precludes a determination that liability does not "arise[]," or the limitation period begin to run, "until the plaintiff has discovered both [her] injury and its cause." *Kubrick*, 444 U.S. at 120; cf. *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 192-193 (1997) (noting that language of a borrowed limitation provision "does not necessarily provide all the answers," and deferring consideration of "various [possible] discovery accrual rules"). Although every statute

must be considered on its own terms, appellate decisions construing the Privacy Act confirm that such an interpretation of the language is permissible, and suggest that it would be appropriate here as well.

B. Inclusion Of An Express Anti-Concealment Provision In Section 1681p Does Not Imply A Congressional Intention To Prohibit Use Of A Discovery Rule

The foregoing conclusion does not change because Section 1681p—like Section 552a(g)(5)—includes an express anti-concealment provision. That provision is not, as petitioner contends (Br. 20-21), simply a "limited discovery rule." It incorporates, instead, a version of the judicial doctrine of equitable estoppel. That doctrine is distinct both from the discovery rule and from the related doctrine of equitable tolling. Congress's decision to include an express version of one principle in the text of the Act does not compel the conclusion that it intended to exclude application of the others—at least here, where the particular circumstances under which FCRA actions typically arise otherwise support the use of a discovery rule. See pp. 24-30, *infra*. Nor would the use of a discovery rule render the anti-concealment provision "superfluous" (Pet. Br. 23).

1. In *United States* v. *Brockamp*, 519 U.S. 347, 348-349 (1997), two taxpayers claimed that they suffered from disabilities (senility or alcoholism) that had prevented them from complying with the statutory deadline for filing tax refund claims under 26 U.S.C. 6511, and that their time for filing suit should be extended under principles of "equitable tolling." The Court concluded that such tolling would be inconsistent with the structure and purpose of the relevant tax laws. See 519 U.S. at 350-354. The Court's opinion does not itself define "equitable tolling." The Court instead relied, for

that purpose, on citations to two authorities: 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1056 (2d ed. 1987 & Supp. 1996) (Wright & Miller), and Judge Posner's opinion for the Seventh Circuit in *Wolin* v. *Smith Barney Inc.*, 83 F.3d 847, 852 (1996).

Both those authorities draw a distinction, important here, between the doctrines of "equitable tolling" and "equitable estoppel." See Wright & Miller § 1056, at 48-58 nn.25.1-25.3 (Supp. 2001); *Wolin*, 83 F.3d at 852-853; see also 2 C. Corman, *Limitation of Actions*, chs. 8-10 (discussing tolling), 11 (discussing discovery rule) (1991 & Supp. 1993). *Wolin* explains that "[e]quitable tolling is invoked when the prospective plaintiff simply does not have and cannot with due diligence obtain information essential to bringing a suit," whereas "[e]quitable estoppel * * * is invoked when the prospective defendant * * * make[s] * * * a special effort to cover up [a] fraud or does something else to prevent the prospective plaintiff from suing in time, such as promising not to plead the statute of limitations as a defense," 83 F.3d at 852, or actively "conceal[ing] his identity or other facts that the plaintiff needed in order to be able to file suit" (*id.* at 850). The two doctrines

> differ critically in scope in the following respect: when the plea is equitable tolling rather than equitable estoppel, the defendant is innocent of the delay (though not of course of the original wrong), so the plaintiff must use due diligence to be allowed to toll the statute of limitations; if he does not, he has no equitable claim to avoid the time bar. In the case of equitable estoppel, which requires active misconduct by the defendant, the plaintiff is not required to be diligent.

Id. at 852. The particular form of "active misconduct" in which a defendant conceals its identity or other facts critical to the plaintiff's ability to bring suit is a "part of [the equitable estoppel doctrine] that goes by the name 'fraudulent concealment.'" *Id.* at 850; see also *id.* at 855 (fraudulent concealment "is not a synonym for equitable estoppel, though it overlaps with it").

From this discussion, it is clear that the anti-concealment provision that Congress included in Section 1681p addresses issues of equitable estoppel, and in particular of fraudulent concealment. Cf. *Wolin*, 83 F.3d at 850 (discussing analogous provision in 29 U.S.C. 1113(a)); 83 F.3d at 855 (noting possible effect of inclusion of express statutory provision concerning concealment on continued applicability of other aspects of equitable estoppel doctrine). The provision does not apply unless the defendant has "willfully misrepresented" to the plaintiff information that it had a duty to disclose under the FCRA, and that is "material to the establishment of the defendant's liability"—and, accordingly, of the plaintiff's right to sue—under the Act. 15 U.S.C. 1681p. When it does apply, the limitation period runs from "discovery by the [plaintiff] of the misrepresentation"—without regard to the plaintiff's diligence in uncovering the defendant's misconduct. In enacting those provisions, Congress may well have "modifie[d] and supplant[ed] the judge-made doctrine" of equitable estoppel. Cf. *Wolin*, 83 F.3d at 850 (discussing analogous provision). There is, however, no reason to conclude in this case that in addressing fraudulent concealment, Congress meant to preclude use of the discovery rule in construing or applying Section 1681p.

That rule is "another judge-made doctrine of statute of limitations law generally applicable in federal cases (unless of course modified by statute * * *)," and it "must be distinguished from" both equitable estoppel and equitable tolling. *Wolin*, 83 F.3d at 852; see also *Connors* v. *Hallmark & Son Coal Co.*, 935 F.2d 336, 340-341 (D.C. Cir. 1991) (R.B. Ginsburg, J.) (deciding case on discovery-rule grounds and therefore not reaching issues of fraudlent concealment); Wright & Miller § 1056, at 46-48 n.1.2 (Supp. 2001). *Wolin* relies, in turn, on the discussion of the different doctrines in *Cada* v. *Baxter Healthcare Corp.*, 920 F.2d 446, 450-453 (7th Cir. 1990) (Posner, J.), cert. denied, 501 U.S. 1261 (1991). This Court too has noted the distinction. See *Klehr*, 521 U.S. at 192 (citing *Cada* for its "descri[ption of the] differences among various discovery rules and doctrines of 'equitable tolling' and 'equitable estoppel'"); cf. *Rotella* v. *Wood*, 528 U.S. 549, 554 n.2 (2000) (reserving applicability of discovery rule in private suits under Racketeer Influenced and Corrupt Organizations Act); *id.* at 561 (citing *Klehr* as noting "distinctions between different equitable devices" that might also apply).

Wolin explains that under the discovery rule, "the statute of limitations does not even *begin* to run until the prospective plaintiff learns or should learn that he has been injured." 83 F.3d at 852. Equitable tolling and estoppel, by contrast, normally operate "[a]fter the statute of limitations starts running," and define certain circumstances under which running of the period may be "arrested." *Ibid.* *Cada* elaborates that where something about the original wrongful conduct (such as a fraud) "prevent[s] the plaintiff from discovering that he is a victim" of the wrong (*i.e.*, that he has been injured), the effect of that conduct is "within the domain of the discovery rule"; if that rule applies, the circumstances will "postpone the date of accrual" of a claim and the

beginning of the limitation period. 920 F.2d at 451. In the case of equitable tolling or estoppel, by contrast, "the plaintiff is assumed to know that he has been injured, so that the statute of limitations has begun to run; but he cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant." *Ibid.*

Thus, these doctrines differ from the discovery rule in the following respects. First, because the discovery rule governs the time when the limitation period begins to run, a plaintiff is, by definition, entitled to the benefit of the entire limitation period after the time she learns (or should learn) that the defendant's conduct has injured her. Under equitable estoppel as a judicial doctrine, the plaintiff would be entitled to the full statutory limitation period, *plus* any time during which the defendant succeeded in actively concealing some fact material to the plaintiff's right or decision to sue. *Cada*, 920 F.2d at 452. Under equitable tolling, however, where the plaintiff lacks critical information but the defendant has not actively concealed that information, the plaintiff is, under *Cada*, entitled only to whatever extension of the statutory period (if any) is reasonably necessary to allow her time to sue. *Id.* at 453. The plaintiff must, in other words, "bring suit within a reasonable time after [s]he has obtained, or by due diligence could have obtained, the necessary information." *Ibid.*; see also *Wolin*, 83 F.3d at 852-853.

Second, equitable tolling is often claimed on the basis of some sort of special disability—such as minority, illness, or absence of the plaintiff or defendant from the jurisdiction—that prevented the potential plaintiff from suing in the time ordinarily allowed. See, *e.g.*, *Brockamp*, 519 U.S. at 348 (senility and alcoholism claimed as extenuating disabilities); 2 Corman, *supra*, chs. 9-10. The analysis therefore focuses on the actual circumstances of a particular plaintiff. Equitable estoppel focuses on whether, and for how long, special conduct by a particular defendant wrongfully prevented the plaintiff from suing that defendant to seek redress for a known injury. See *Wolin*, 83 F.3d at 850, 852. In contrast to each of those doctrines, the discovery rule asks when a potential plaintiff knew, or when a reasonable person in her position should have known, that she had been injured by the defendant's conduct. See 2 Corman, *supra*, § 11.4 & n.2; see also *id.* §§ 11.5.6 & n.51, 11.5.8. It is therefore most appropriately employed where the very fact of injury may not ordinarily be apparent to the person injured. See *Connors*, 935 F.2d at 342-343.

The discovery rule and the doctrines of tolling and estoppel are, of course, closely related, and *Cada* points out that they are "frequently confused." 920 F.2d at 451; see also, *e.g.*, *Wolin*, 83 F.3d at 852; cf. *Klehr*, 521 U.S. at 192 (reserving judgment on related issues and noting that "[t]he legal questions involved may be subtle and difficult."). Our point here does not depend on any comprehensive exploration of their subtleties, or reconciliation of their potentially overlapping domains. Cf., *e.g.*, *Beggerly*, 524 U.S. at 48 (indicating that by including its own express discovery rule, a statutory limitation provision had "already effectively allowed for equitable tolling"); *Holmberg*, 327 U.S. at 397 (discussing equitable doctrines and giving as an example the discovery rule traditionally applied in cases of fraud). What we have said in broad outline concerning the relevant background legal principles suffices to show that the express anti-concealment provision in Section 1681p covers only circumstances that would otherwise be addressed primarily by the "fraudulent concealment" strain of the equitable estoppel doctrine. Because that doctrine is distinct from the discovery rule, and because use of the discovery rule is otherwise appropriate in the special circumstances the FCRA (see pp. 24-30, *infra*), the fact that Congress chose to address directly circumstances that would otherwise raise issues of estoppel does not justify an inference that it thereby intended to *exclude* operation of the discovery rule in determining when the basic limitation period begins to run. Cf. *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387 n.23 (1983) (*expressio unius* maxim "cannot properly be applied to a situation where the remedies redress different misconduct and where the remedial purposes of the Acts would be undermined by a presumption of exclusivity").

2. Nor would use of the discovery rule render the anti-concealment provision "superfluous." See Pet. Br. 23-25. As the foregoing discussion explains, the two apply in different circumstances, and address different potential problems. The discovery rule applies when a potential plaintiff does not even know that she has been injured, and prevents the limitation period from beginning to run until she is (or should be) on notice of the injury—at which point she may fairly be held to a requirement of due diligence. The concealment provision applies, whether or not the plaintiff is aware of the injury, if the defendant attempts through wrongful misrepresentations to prevent or dissuade the plaintiff from filing suit, and seeks to ensure that the defendant will not profit from that conduct.

These differences lead to the use of different criteria for when the limitation period begins to run: When the potential plaintiff learned or should have learned of her injury, or when she actually learned of the potential defendant's wrongful misrepresentations. As the District of Columbia Circuit explained in a Privacy Act case, rejecting essentially the same argument petitioner makes here, the difference between the date when the plaintiff should, with due diligence, have learned of her injury and the date that she actually learned, with or without diligence, of a defendant's related misrepresentation is enough to give each rule independent scope. See *Tijerina*, 821 F.2d at 798; cf. *Wolin*, 83 F.3d at 852 (distinguishing tolling from estoppel based on diligence requirement).

A simple example clarifies the point. If a credit reporting agency included false derogatory information in a consumer's file and released it to a requester, in violation of the Act, but the consumer had no reason to learn of the wrong (for instance, because the requester granted her credit in any event—although perhaps on less favorable terms than it otherwise would have offered), under the discovery rule the limitation period in Section 1681p would not begin to run. If another requester, receiving the same information, later denied the consumer credit, the consumer would presumably be put on inquiry notice of the violation, and the discovery rule *would* start the running of the normal limitation period—whether or not the consumer took any further action. If, however, the consumer then asked the reporting agency whether it had provided a report to the second requester, and the agency denied doing so, then the basic period would become irrelevant as to that defendant. The anti-concealment rule would start a new period running whenever the consumer later actually discovered that the defendant had lied to her—even if the consumer had other means of learning the truth at the time of the first denial, and even if she did not diligently pursue the matter thereafter.

The discovery rule would not, therefore, "operate in exactly the same manner" as the anti-concealment provision, even "[a]s a practical matter." See Pet. Br. 24. First, it is not true that a potential plaintiff who is able to invoke the concealment provision is necessarily "also blamelessly ignorant of her claims and therefore protected by a general discovery rule." *Ibid.* Such a plaintiff might well be on at least inquiry notice of her claims, and thus outside the protection of the discovery rule, at the time a misrepresentation is made. Or a plaintiff who is on notice may never *make* the inquiry that might trigger either a misrepresentation or an honest response. Indeed, that would be the classic situation for the operation of any statute of limitations —when the plaintiff is on notice that she has (or may have been) been injured, and has enough information to pursue her right to legal redress, but does not do so with due diligence. See, *e.g.*, *Kubrick*, 444 U.S. at 122-125.

Second, it is not true that "the limitations period under a general discovery rule would commence at the same time as the period under the" concealment provision. See Pet. Br. 24. In cases where there is a misrepresentation, the general period may or may not have begun to run before that time, depending on whether other circumstances have given the potential plaintiff reason to know that she has been injured by conduct within the purview of the Act. For the same reason, the basic limitation period in such a case might or might not, in theory, "run for the same two-year period" as the period established by the concealment provision. Whether it would or not is of little moment, however, because if there *is* a misrepresentation, the concealment provision wholly supplants the basic limitation period with respect to the misrepresenting defendant—whether or not the discovery rule is, or otherwise would have been, used to determine when that period began to run. The basic period operates in cases—presumably the vast majority—in which there is *not* a misrepresentation; and in those cases, a variety of other attendant circumstances will determine when a potential plaintiff first had enough information to trigger a duty of diligence in deciding whether or not to pursue a legal remedy under the FCRA.

II. USE OF A DISCOVERY RULE BEST COMPORTS WITH THE HISTORY, STRUCTURE, AND PURPOSES OF THE FAIR CREDIT REPORTING ACT

Because the text of Section 1681p neither requires nor precludes the use of a discovery rule for purposes of the basic limitation period, the real question in this case is which of two possible statutory constructions—a discovery rule, or a strict time-of-violation rule—is the more appropriate one. This Court has repeatedly cautioned that such an inquiry is purposive, not "technical" or "mechanical." *Crown Coat Front*, 386 U.S. at 517; *Urie*, 337 U.S. at 169; *Reading Co.*, 271 U.S. at 61-62 ("We do not think it is possible to assign to the word 'accrued' any definite technical meaning which by itself would enable us to say whether the statutory period begins to run at one time or the other."); cf. *Klehr*, 521 U.S. at 192-193 (deferring consideration of possible accrual rules). In *Kubrick*, for example, the Court accepted the basic discovery rule (awareness of injury and cause) as appropriate for malpractice cases under the FTCA, but rejected a more generous rule because it "would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims." 444 U.S. at 123; see *id.* at 122-125. As *Kubrick* demonstrates, such distinctions are to

be made by interpreting any given limitation provision "in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served" by the limitation period. *Reading Co.*, 271 U.S. at 62; cf. *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424, 426-436 (1965) (purposive analysis of tolling question). In the case of the FCRA, those considerations favor use of a discovery rule.

The "obvious purpose" of a limitation provision "is to encourage the prompt presentation of claims." *Kubrick*, 444 U.S. at 117. Limitation of actions protects potential defendants and the courts from the need to litigate stale claims—after "affording plaintiffs what the legislature deems a reasonable time to present th[ose] claims." *Ibid.* In the ordinary case, in which conduct by a known defendant has arguably led to a known or alleged injury to the plaintiff, those dual purposes are well served by starting the running of the limitation period from the time when the plaintiff's claim is first ripe for legal resolution. See note 3, *supra*; *Connors*, 935 F.2d at 342.

In certain types of cases, however, the plaintiff often will not learn of an injury, in the ordinary course, until some time after it has been inflicted. In such cases it may be meaningless to require "diligence" by the plaintiff from the time of the unsuspected injury, and inconsistent with legislative intent to allow a period of limitation to begin to run (and perhaps to run completely) before the plaintiff is even aware of the basic factual predicates for her potential cause of action. It is in such situations that this Court has applied the discovery rule. See *Kubrick*, 444 U.S. at 122 (medical malpractice) ("That [the plaintiff] has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain."); *Urie*, 337 U.S. at 170 (compensation for latent occupational injury) (Remedial legislation would not have "intended such consequences to attach to blameless ignorance"; rather, "statutes of limitations * * * conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights."); see also *Holmberg*, 327 U.S. at 397 (fraud).

The FCRA fits this model. As the D.C. Circuit observed about the Privacy Act, the FCRA "seeks to provide a remedy for [wrongful] conduct that by its very nature is frequently difficult to discover." *Tijerina*, 821 F.2d at 797. As with Privacy Act violations, "unauthorized, unconsented-to disclosure[s]" of credit information, or careless inclusions of inaccurate information in a credit report, are "unlikely to come to the subject's attention until [they] affect[] him adversely, if then," and "possible violations of the Act are often not immediately apparent to the aggrieved individual." *Id.* at 797-798. Thus, in construing the FCRA, as in construing the Privacy Act, "Congress's desire to provide a civil remedy would be poorly served if the cause of action could arise before the plaintiff even had reason to know of the violation." *Id.* at 798; see also *Connors*, 935 F.2d at 343 (holding discovery rule applicable under different statute because conduct was "likely to [cause] a hidden injury, similar to the type of injury that has long triggered the discovery rule," and because use of rule would be consistent with Congress's remedial intent). It is similarly appropriate to construe Section 1681p to include the discovery rule.

That conclusion is consistent with the length of the FCRA limitation period. Where a statute permits an unusually long time to bring suit, Congress may already have taken into account the difficulties a plaintiff may face in learning the facts necessary to perfect his cause of action. Cf. *Beggerly*, 524 U.S. at 48-49 (taking "unusually generous nature" of 12-year period into account in rejecting equitable tolling under the Quiet Title Act). The FCRA's two-year period is, however, not lengthy, and suggests that Congress would not have expected the period to begin to run until the potential plaintiff is on at least inquiry notice of a possible claim.

Use of a discovery rule is also consistent with the history and structure of the FCRA. As petitioner recognizes (Br. 36), Congress when it adopted the Act was well aware of the difficulties then facing consumers in discovering how or whether they might have been harmed by credit reporting practices. Although the Act addressed those difficulties in part by adopting new disclosure rules and record-correction mechanisms, see 15 U.S.C. 1681g-1681i (1994 & Supp. V 1999), it also required reporting agencies to follow "reasonable procedures" to ensure the accuracy of their reports, 15 U.S.C. 1681e(b), and to ensure compliance with the Act's specific restrictions on the release of information to third parties, 15 U.S.C. 1681b (1994 & Supp. V 1999); 15 U.S.C. 1681e(a). Those procedural requirements were to be enforced in large part through private lawsuits. 15 U.S.C. 1681n-1681*o* (1994 & Supp. V 1999). In enacting those provisions, Congress was surely aware that the nature of the credit reporting business would not fundamentally change, and that many records would still be compiled and released to third parties without any direct notice to the affected consumer. Although it no doubt expected potential plaintiffs to be diligent in pursuing *suspected* claims—in part by using the Act's new tools for forcing disclosures by the reporting agencies—there is no reason to think it intended to impose a limitation period that would run even as to claims a consumer had no reason to suspect.[5]

That conclusion serves the public interest, as well as the interests of private litigants such as respondent. As petitioner points out (Br. 30), major credit reporting agencies in the United States maintain computerized files on nearly 200 million individuals—virtually the entire adult population of the United States—and issue hundreds of millions of consumer reports every year. Although the FCRA gives the Federal Trade Commission and other federal officials authority to enforce the Act, 15 U.S.C. 1681s (1994 & Supp. V 1999), their resources are not sufficient by themselves to ensure adequate monitoring of compliance. Enforcement of the Act therefore depends to an important degree on private damage actions, in which plaintiffs act not only on their own behalf, but as "private attorneys general." *Rotella*, 528 U.S. at 557; cf., *e.g.*, *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231 (1988) (private suits are "an essential tool for enforcement" of securities laws).

Such actions have become even more important in recent years as the phenomenon of identity theft, illustrated by the facts of this case, has expanded the possibilities for (and potential damage from) violations of the Act. Identity theft cases underscore the importance of the "reasonable procedures" provisions (15 U.S.C. 1681e(a) and (b)) that lie at the heart of respondent's claim on the merits in this case. Yet the Federal Trade Commission's analysis of consumer complaints indicates that in cases of identity theft it takes more than 25% of victims a year or more to discover that they have been victimized. In the absence of a discovery rule, those victims would have a year or less to investigate whether they had been harmed by related violations of the FCRA, and if so to bring suit.

The important public purposes served by private litigation can under some circumstances counsel against undue extension of a limitation period. See *Rotella*, 528 U.S. at 558 (enforcement of statutes through such litigation is "an object pursued the sooner the better"). It supports, however, the use of a rule under which the limitation period begins to run only once a potential plaintiff knows that she has been injured. Only then may the running of the period effectively encourage a private litigant to be diligent in pursuing her potential statutory remedies, thereby also serving the public interest. Compare *id.* at 558-559 ("Rotella does not deny that he knew of his injury * * * when it occurred[.]").

Compared to a rule under which "liability arises" at the time of an FCRA violation, even if the affected consumer has no reason to know the violation has occurred, a discovery rule will somewhat lengthen the time during which a defendant may find itself subject to suit. By definition, however, it does so only when the plaintiff has exercised due diligence. In such situations, in which neither party is to blame for the delay in notice of injury to the plaintiff, and in which the defendant may or may not be operating in complete good faith, the discovery rule reconciles the affected interests by allowing litigation on the merits of the plaintiff's statutory claims. That outcome serves the ends of justice and law enforcement, and imposes on defendants only the ordinary costs of establishing that their business practices comply with applicable federal law. Accordingly, in the view of the United States and the Federal Trade Commission—the agency charged by Congress with principal responsibility for enforcement of the FCRA—use of the discovery rule under the FCRA strikes the proper balance between potential defendants' legitimate interest in repose and the private and public interests in ensuring that potential plaintiffs receive the full measure of "what the legislature [has] deem[ed] a reasonable time to present their claims." *Kubrick*, 444 U.S. at 117.

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[5] Petitioner notes (Br. 36-37) that Congress did not adopt *in haec verba* a proposal, offered in testimony by Professor Arthur Miller, that the limitation period "should be measured 'from the date of the occurrence of the violation or the date on which the violation is discovered.'" On the other hand, as petitioner explains (Br. 37), the "occurrence" language of various precursor bills was ultimately changed, without explanation, to the final "liability arises" language of Section 1681p. Neither observation answers the question, presented here, whether the language Congress actually adopted should or should not be read to incorporate the discovery rule. Since the language *permits* such a reading, that question is best answered by examining whether use of the rule is consistent with the remainder of the Act and serves its purposes.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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TRW INC.,

Petitioner,

v.

ADELAIDE ANDREWS,

Respondent.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL CONSUMER LAW CENTER, U.S. PUBLIC INTEREST RESEARCH GROUP, PRIVACY RIGHTS CLEARINGHOUSE, AARP, AND CONSUMER FEDERATION OF AMERICA IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

A. Congress Has Determined That Accuracy and Respect for Privacy in Disseminating Personal Financial Information Are Essential in a Credit Economy 5

B. The Three Major Consumer Reporting Agencies Have Failed to Take Available Action to Abate the Current Theft of Identity Crisis 9

C. Petitioner's Claim That the Decision Below Undermines the "Balance" Established by Congress Is a Canard 12

  1. The Plain Language Chosen by Congress Belies Petitioner's Argument 13

  2. Petitioner Relies on Notice Provisions Which Do Not Protect Victims of Theft of Identity 14

  3. Consumer Reporting Agencies Convinced Congress to Eliminate the Very Access Provision Which Would Have Supported the Position Now Advanced Before This Court 16

  4. Petitioner's Claimed Record-Keeping Burden is Unfounded 18

  5. The Only Statutory Balance at Risk Is the Private Enforcement Remedy That Petitioner Now Seeks to Eliminate 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Bryant v. TRW Inc., 689 F.2d 72 (6th Cir. 1982) 6

Cushman v. Trans Union Corp., 115 F.3d 220 (3d Cir. 1997) 8, 11

DiMezza v. First USA Bank, Inc., 103 F.Supp.2d 1296 (D.N.M. 2000) 21

Federal Trade Commission v. TRW Inc., 784 F.Supp. 361 (N.D. Tex. 1991) 9

Houghton v. Insurance Crime Prevention Institute, 795 F.2d 322 (3d Cir. 1986) 14

McMillan v. Experian Information Services, Inc., 119 F.Supp.2d 84 (D.Conn. 2000) 21

Mourning v. Family Publication Service, Inc., 411 U.S. 356 (1973) 7

Philbin v. Trans Union Corp., 101 F.3d 957 (3d Cir. 1996) 11

Thompson v. San Antonio Retail Merchants Association, 682 F.2d 509 (5th Cir. 1982) (Per Curiam) 11

Trans Union Corp. v. Federal Trade Commission, 245 F.3d 809 (D.C. Cir. 2001) 6

United States v. Equifax Credit Information Services, Inc., No. 1:00-CV-0087 (N.D. Ga. 2000), available at http://www.ftc.gov/os/2000/01/equifaxconsent.htm 18

TABLE OF AUTHORITIES – Continued

Page

United States v. Experian Information Solutions, Inc., No. 3-00CV0056-L (N.D. Tex. 2000), available at http://www.ftc.gov/os/2000/01/experianconsent.htm. 18

United States v. Trans Union LLC, No. 00C 0235 (N.D. Ill. 2000), available at http://www.ftc.gov/os/2000/01/transunionconsent.htm. 18

Whitesides v. Equifax Credit Information Services, Inc., 125 F.Supp.2d 807 (W.D.La. 2000) 21

STATUTES

Consumer Credit Protection Act,
15 U.S.C. §§ 1601-1693r 5

Consumer Credit Reporting Reform Act of 1996, Title II, Subtitle D, Ch. 1, of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997 (P.L. 104-208) (Sept. 30, 1996) 8

Credit Repair Organizations Act,
15 U.S.C. §§ 1679-1679j
15 U.S.C. § 1679i(1) 13

Electronic Fund Transfers Act,
15 U.S.C. §§ 1693-1693r 7

15 U.S.C. § 1693m(g) 13

Equal Credit Opportunity Act,
15 U.S.C. §§ 1691-1691f
15 U.S.C. § 1691d 7

15 U.S.C. § 1691e(f) 13

Page

Fair Credit Reporting Act,
§§ 1681-1681u
15 U.S.C. § 1681(a)(1) 6
15 U.S.C. § 1681(a)(4) 6
15 U.S.C. § 1681(b) 6
15 U.S.C. §§ 1681b-1681f 15
15 U.S.C. § 1681b(a) 12
15 U.S.C. § 1681b(f) 21
15 U.S.C. § 1681c(a)(1) 19
15 U.S.C. §§ 1681c(a)(2)-(6) 19
15 U.S.C. § 1681c(b) 19
15 U.S.C. § 1681e(a) 11
15 U.S.C. § 1681e(b) 7
15 U.S.C. § 1681g(c)(1)(B) 17
15 U.S.C. § 1681h(a)(1) 11
15 U.S.C. § 1681j(a) 17
15 U.S.C. § 1681j(b) 17
15 U.S.C. § 1681j(c)(3) 16
15 U.S.C. § 1681m(a) 15
15 U.S.C. § 1681n(a)(1) 14, 21
15 U.S.C. § 1681p 13, 14, 16
15 U.S.C. § 1681s 20
15 U.S.C. § 1681s-2(b) 21

Page

Fair Debt Collection Practices Act,
15 U.S.C. §§ 1692-1692o 8
15 U.S.C. § 1692(a) 8
15 U.S.C. § 1692k(d) 14

Truth in Lending Act,
15 U.S.C. §§ 1601-1667e 7
15 U.S.C. § 1601(a) 7
15 U.S.C. § 1640(e) 13

LEGISLATIVE AND ADMINISTRATIVE MATERIAL

Federal Reserve Board Regulation B, 12 C.F.R. § 202.9(a) (2001) 15

Federal Reserve Board Statistical Release, G.19, Consumer Credit, March 2001, Release Date: May 7, 2001, available at http://www.federalreserve.gov/Releases/G19/Current 6

Federal Trade Commission, Identity Theft Victim Complaint Data, Figures and Trends November 1999 through March 2001, available at http://www.consumer.gov/idtheft/reports/repmar01.pdf and http://www.consumer.gov/idtheft/charts/nov99-mar01.pdf. 10

H. Rep. 103-486, 103d Cong., 2d Sess. 13, § 110, H.R. 1015, § 612(c) 17

S. Rep. 103-209, 103d Cong., 1st Sess. 2-3 (1993) 5, 6, 8, 20

INTEREST OF *AMICI CURIAE*[1]

Amici are public interest organizations with longstanding experience with the consumer reporting and privacy issues involved in this case. *Amici* are submitting this brief to provide the Court with information about the operations of the consumer reporting industry distinct from the arguments contained in the Brief for Respondent.

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing struggle to curb unfair and abusive business practices. Compliance with federal consumer protection laws in general and the Fair Credit Reporting Act (FCRA) in particular has been a continuing concern of NACA since its inception.

The National Consumer Law Center, Inc. (NCLC) is a non-profit Massachusetts corporation, founded in 1969, specializing in consumer law issues, with a historical emphasis on consumer credit. The NCLC regularly provides legal and technical consultation and assistance on consumer law issues, including credit reporting, to legal services, government, and private attorneys representing consumers across the country. The NCLC prepares and publishes the Consumer Credit and Sales Legal Practice Series, consisting of thirteen practice treatises and annual supplements. One volume, Willard P. Ogburn, Fair Credit Reporting Act (4th ed. 1998 & Supp. 2000), is a standard resource on privacy and the FCRA that is cited by Petitioner throughout its Brief. The fairness, accuracy, and confidentiality of individuals' credit information were a persistent problem for the NCLC's low income clients even before the passage of the FCRA; these problems unfortunately continue to date.

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

The U.S. Public Interest Research Group serves as the national lobbying office for state Public Interest Research Groups (PIRGs). PIRGs are non-profit, non-partisan consumer, environmental and government research and advocacy organizations active in 37 states. Since 1991, U.S. PIRG and the state PIRGs have published 7 investigative reports and surveys on credit bureau errors and identity theft problems, including one joint report with the Privacy Rights Clearinghouse. The reports have been used by Congress and state legislatures in the development of legislation, including both the 1996 comprehensive credit reporting amendments and the 1998 identity theft criminalization statute enacted by Congress. California PIRG also has founded and supports the efforts of Victims of Identity Theft, a Los Angeles-based support group for victims.

The Privacy Rights Clearinghouse (PRC) is a nonprofit consumer information, research, and advocacy program based in San Diego, California. It was established in 1992 when it launched a hotline to take individuals' complaints and questions on consumer privacy issues. PRC was one of the first consumer organizations to provide assistance to victims of identity theft, which became its number one topic of hotline calls beginning in 1995. PRC's victim assistance guides have helped tens of thousands of identity theft victims regain their financial health. The PRC has participated in numerous public policy proceedings (legislative and regulatory hearings, workshops, conferences) at the state and federal level on identity theft.

AARP is a non-profit organization with 34 million members aged 50 and older. It is the largest membership organization dedicated to addressing the needs and interests of older Americans. AARP participates in proceedings aimed at improving consumer protection laws and assuring adequate redress when older consumers are harmed in the marketplace. AARP supports vigorous enforcement of the Fair Credit Reporting Act. It specifically advocates for stronger laws to protect the confidentiality of Social Security numbers, to protect and provide assistance to victims of identity theft, and to ensure that consumers have avenues for redress when they are harmed by an inappropriate disclosure or use of their personal information.

The Consumer Federation of America (CFA) is a nonprofit association organized in 1967 to advance the interests of consumers through advocacy and education. CFA's current membership is comprised of over 280 national, state, and local consumer groups throughout the United States, which in turn represent more than 50 million consumers. CFA supports and promotes consumer credit protections to prevent fraud and provide redress to consumers.

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SUMMARY OF ARGUMENT

Congress's findings and statement of purpose when it enacted the Fair Credit Reporting Act demonstrate the significance that it rightly placed on the integrity and confidentiality of the nation's consumer reporting system. Unfortunately, the three major national consumer reporting agencies have shown an inadequate commitment over the last thirty years to conducting their business in a manner commensurate with the grave responsibilities entrusted to them.

As these consumer reporting agencies have struggled with their obligations to compile and report personal financial data completely and accurately, a relatively recent assault on the integrity of the consumer reporting system has emerged in the form of theft of identity. This phenomenon is a threat to which literally every American is vulnerable. In this area, the reporting agencies' efforts are wholly insufficient. The industry has the capability to curtail these activities, if not to bar virtually all identity thieves from compromising individual consumer reports, the *sine qua non* of the offense. Instead, the consumer reporting system itself has become the vehicle through which these thieves operate.

Through this case, the industry now seeks an interpretation of the statute of limitations that would seriously undermine the paramount method chosen by Congress to provide the necessary incentive for reporting agencies to meet their obligations to protect the integrity and confidentiality of individual consumer reports – private enforcement by aggrieved consumers. Petitioner wishes to limit the FCRA's statute of limitations in a manner that, if sustained, would create a nearly all-encompassing exception to suits by the individuals who are the victims of the current identity theft epidemic. Petitioner's supporting arguments are at odds with the plain language of the FCRA, and the "balance" which it purports to maintain is illusory.

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ARGUMENT

A. Congress Has Determined That Accuracy and Respect for Privacy in Disseminating Personal Financial Information Are Essential in a Credit Economy

Congress enacted the Fair Credit Reporting Act (FCRA) in 1970 as Title VI of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r (CCPA), the plenary regulation of the national consumer credit industry. Consumer credit has expanded exponentially in the last fifty years and is now one of the largest sectors of the national economy. Growing from $6 billion at the end of World War II, outstanding consumer credit debt rose to $116 billion in 1970 when Congress enacted the FCRA, reached over $700 billion by 1993 [S. Rep. 103-209, 103d Cong., 1st

Sess. 2-3 (1993)], and most recently passed $1.5 trillion. *See* Federal Reserve Board Statistical Release, G.19, Consumer Credit, March 2001, Release Date: May 7, 2001, available at http://www.federalreserve.gov/Releases/G19/Current.

To support this phenomenal level of activity, only eight years ago the consumer reporting industry maintained 450 million credit files on more than 110 million individuals and processed almost 2 billion pieces of data per month. S. Rep. 103-209, *supra*, at 3. Now, the data base of just one of the three major consumer reporting agencies contains information on the personal financial habits of 190 million persons, virtually the entire adult population of the country, and that agency alone processes approximately 1.5 billion records per month. *Trans Union Corp. v. Federal Trade Commission*, 245 F.3d 809, 812 (D.C. Cir. 2001).

Congress adopted the FCRA with the explicit recognition that the health of the consumer banking system is "dependent upon fair and accurate credit reporting" and that "[i]naccurate credit reports directly impair the efficiency of the banking system." 15 U.S.C. § 1681(a)(1); *see Bryant v. TRW Inc.*, 689 F.2d 72, 79 (6th Cir. 1982). With particular relevance to the identity theft crisis which underlies this case, Congress focused on the "need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right of privacy" and "confidentiality." 15 U.S.C. §§ 1681(a)(4) and (b). Accordingly, Congress has mandated that consumer reporting agencies follow procedures to "assure maximum possible accuracy of the information *concerning the individual about whom the report relates.*" § 1681e(b) (emphasis added).

A recurring theme at the heart of the CCPA is that prudent dissemination of credit information is essential to maintain the vitality of the credit granting system for the benefit of creditors and consumers alike. Just as Congress enacted the FCRA with the express purpose that credit grantors be in the best position to make reliable credit granting decisions, the Truth in Lending Act, 15 U.S.C. §§ 1601-1667e, Title I of the CCPA (TILA), establishes the corresponding principle through its disclosure requirements that consumers are best served through their own "informed use of credit." 15 U.S.C. § 1601(a). In addition to the FCRA and TILA, Congress has included a further self-help checking mechanism within the CCPA as Title VII, the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (ECOA), providing yet another information-sharing standard through its core requirement that creditors disclose, and consumers receive, the specific reasons for any adverse action, such as credit denial. 15 U.S.C. § 1691d.

This Court succinctly stated the guiding principle of this congressional philosophy nearly thirty years ago in its seminal teaching under the CCPA: "[B]lind economic activity is inconsistent with the efficient functioning of a free economic system such as ours." *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 364 (1973). The FCRA was adopted with the recognition that credit decisions made in ignorance, whether by credit grantors or consumers, undermine the vitality of the consumer economy.

Unfortunately, despite the intent of Congress in adopting the FCRA, accurate information is not being consistently provided by the consumer reporting system to its credit-granting clientele. In the deliberations that culminated with the 1996 FCRA amendments [Consumer Credit Reporting Reform Act of 1996, Title II, Subtitle D, Ch. 1, of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997 (P.L. 104-208) (Sept. 30, 1996)], Congress was presented with staggering statistics that nearly half of all consumer reports (48%) maintained by the three major consumer reporting agencies contains inaccurate information and nearly one out of five (19%) contains errors that could adversely affect the consumer's eligibility for credit. S. Rep. 103-209, *supra,* at 3.

The successful operation of the consumer credit system is key to the performance of the national economy and the ability of all citizens to enjoy the fruits of this country's material prosperity, the envy of the rest of the world. Failure within this system, on the other hand, is expensive as determined by the consequences of consumer default, with their resulting losses and significant personal toll ["bankruptcies, marital instability, loss of jobs, and invasions of individual privacy" (15 U.S.C. § 1692(a))], which Congress sought to prevent and deter through enactment of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o, Title VIII of the CCPA (FDCPA). Despite the extraordinary economic and personal benefits at stake, the three major reporting agencies conduct their business with far too little regard for the inordinate personal price of their failure or for the mandates imposed by Congress to cure the agencies' shortcomings. *See Cushman v. Trans Union Corp.*, 115 F.3d 220, 224-26 (3d Cir. 1997) (criticizing inadequate reinvestigation procedures); *Federal Trade Commission v. TRW Inc.*, 784 F.Supp. 361 (N.D. Tex. 1991) (comprehensive consent order attempting to correct massive FCRA noncompliance).

B. The Three Major Consumer Reporting Agencies Have Failed to Take Available Action to Abate the Current Theft of Identity Crisis

Theft of identity is the intentional and fraudulent practice whereby an impostor poses as someone else and applies for and receives credit on the basis of another's good credit standing. The impostor then makes purchases, obtains credit cards, and takes out loans using the dishonestly obtained credit approvals and leaves the victim facially responsible for the resulting financial obligations. Worse yet, the scam saddles victims with the arduous process of ascertaining what has happened to them and of obtaining information to prove themselves innocent and to restore their good names.

The ease with which the impostor in this case stole the identity of Respondent Adelaide Andrews is all too common and illustrates the allure of the scam. Here, the impostor fraudulently used only Ms. Andrews' Social Security number, while otherwise employing her own similar but different name and completely different remaining identifying information to obtain credit. Impostors use an alternate address (sometimes simply a mail drop) to receive the purchased items, credit cards, and billing statements. The victim therefore receives no notice that a problem exists until denied credit or dunned for payment for the impostor's debts many months or even years later.

A savvy impostor will establish an "evil profile" never touching any of the true accounts of the victim. If the victim's own accounts were to be accessed, the victim would find out earlier about the fraud. Often the impostor will obtain several credit lines to make minimum payments to keep the scam going for as long as possible so the victim does not find out there is a problem. Victims discover the identity theft on average after 15 months, and at least 20% learn of the problem only after two years. *See* Federal Trade Commission, Identity Theft Victim Complaint Data, Figures and Trends November 1999 through March 2001, available at http://www.consumer.gov/idtheft/reports/rep-mar01.pdf and http://www.consumer.gov/idtheft/charts/nov99-mar01.pdf. Even then, the victim still must determine what has transpired, often waiting weeks and months just to receive documents providing information about the accounts. This protracted process further delays taking remedial action and continues the nightmare as the victim deals with disbelieving debt collectors, annoyed creditors, and seemingly unconcerned reporting agencies.

Information received by the national reporting agencies almost always shows early evidence of obvious errors and indicia of fraud. The victims' records contain conflicting information, with one set revealing their real accounts, accurate addresses, and continued positive credit usage, and the other showing overused accounts with a lack of payments in a short time span, as well as the ever present anomalous billing addresses. Nevertheless, *Amici* have seen no evidence that the three major

reporting agencies have taken any action to use their comprehensive data bases and state of the art computing power to effectively combat this scourge. The agencies have products available to sell to creditors to detect changes of addresses (neural networks), however they do not make them available to consumers unless the consumer buys several products to monitor all three credit reporting agencies.

Unlike the recurrent errors that for years have afflicted the three major consumer reporting agencies' reports, such as merging files of different consumers based on tenuous connections, *see, e.g., Philbin v. Trans Union Corp.*, 101 F.3d 957, 960-67 (3d Cir. 1996), and *Thompson v. San Antonio Retail Merchants Association*, 682 F.2d 509, 510-13 (5th Cir. 1982) (per curiam), identity theft is purposeful sabotage. Just like those mismerge errors, however, theft of identity is a regular and predictable part of the credit reporting system; and the consumer reporting agencies whose lack of diligence facilitated the theft here are as unprepared and unsuccessful in combating this intentional misconduct as they are in maintaining the completeness and accuracy of their consumer reports. *See, e.g., Cushman*, 115 F.3d at 224-26.

Significantly, none of the three major reporting agencies discloses to consumers their own file contents based merely on a purported match of a Social Security number without additional indicia of proper identification. *See* § 1681h(a)(1). One would have expected that these agencies would follow protocols with a similar level of scrutiny to meet their parallel obligation pursuant to § 1681e(a) to provide reports only to users who have a legitimate purpose involving the subject consumer. *See*

§ 1681b(a). They do not. This "weakest link" creditor point of entry into the reporting system is all too well known to identity thieves.

C. Petitioner's Claim that the Decision Below Undermines the "Balance" Established by Congress Is a Canard

Petitioner claims that a rule allowing victimized consumers to bring enforcement actions more than two years after the reporting agency reveals personal financial information to a complete stranger "would upset the balance struck by Congress" within the overall statutory scheme. *Brief for Petitioner* at 25. Its stated basis for this assertion includes the "carefully crafted notice and access provisions in the FCRA" [*id.* at 26] and the purported increase to "the cost of doing business . . . .[by] adding to the credit industry's already massive burden of storing information." *Id.* at 30-31.

To the contrary, it is Petitioner's desire for an exclusionary reading of the FCRA, which as a practical matter would immunize consumer reporting agencies from effective private enforcement, that conflicts with Congress's handiwork. Indeed, these factors that Petitioner cites actually support the decision below and undermine its own self-serving view of how the FCRA should function.

It would be an injustice for victims to lose their right to enforce the provisions of the FCRA when in fact they have no idea they have even been harmed. Many victims have good credit and do not apply for a loan or credit card for several years. If the impostor has established several credit lines, is making minimum payments, and has not charged accounts to their limits, the charade can continue without the victim's knowledge for years. When consumers finally learn of the fraud, they often experience further victimization from creditors who will not provide billing statements, from credit reporting agencies which delay sending the credit profiles, and from police who will not even take a report. To expect victims also to address the legal issues when they do not yet understand what has happened to them is unreasonable.

1. The Plain Language Chosen by Congress Belies Petitioner's Argument

First, the plain language of § 1681p is the most reliable indicator of Congress's intent to reject Petitioner's interpretation of this subsection. Petitioner's contention is that the statute of limitations commences when it allegedly *violates* a statutory duty. *Brief for Petitioner* at 16 ("it is at that point that the agency violates the Act"). Congress expressly rejected that standard, however, when it adopted § 1681p's calculation of the start of the limitations period as "the date on which the liability arises," as discussed in the Brief of Respondent. In doing so, Congress chose language different from the terminology that it employed in each of the five other Titles of the CCPA with private rights of action. The statutes of limitations in each of the other CCPA Titles specifically run from the time of the defendant's "violation" of the law, the same language as in the version of the FCRA that was discarded before final enactment. *See* § 1640(e) (TILA) ("from the occurrence of the violation"), § 1679i(1) (Credit Repair Organizations Act) (same), § 1691e(f) (ECOA) (same), § 1693m(g) (Electronic Fund Transfers Act) (same), and § 1692k(d) (FDCPA) ("from the date on which the violation occurs").

No federal appeals court which has adopted Petitioner's position has considered this deliberate congressional choice of language. Instead, each has reached its conclusion without critical analysis of the CCPA's coordinated statutory scheme. *See Houghton v. Insurance Crime Prevention Institute*, 795 F.2d 322, 325 (3d Cir. 1986), and its progeny. These courts based their rulings on the erroneous belief that the result is mandated to avoid rendering the final portion of § 1681p "superfluous." *Id.* This primary basis for affirmance of the decision below is the focus of Respondent's argument and will not be repeated by *Amici.*[2]

2. Petitioner Relies on Notice Provisions Which Do Not Protect Victims of Theft of Identity

Petitioner erroneously contends that the FCRA's notice provisions make it "unnecessary and inappropriate" to affirm the decision below. The FCRA's notice requirements do not allow victims of identity theft to learn when their identities have been stolen or when a consumer reporting agency unlawfully has disclosed the personal financial information contained in their files. The only provision of the FCRA that could alert typical consumers to potential problems with their files is § 1681m(a), which requires transmittal of adverse action notices that necessarily are sent to the impostor. By the nature of the theft of identity scam, the victimized consumer never will receive such a notice because the single essential component of the successful scam is that the impostor establishes a billing address different from the victim's – a discrepancy in itself sufficient to alert a consumer reporting agency to a possible impermissible purpose or theft of identity.

Each of the FCRA's notice provisions naturally presumes that the user and the agency correctly have identified the subject consumer in order to properly deliver notice. Petitioner itself conceded as much in its *Petition for a Writ of Certiorari*, at 13, when it recognized the limitations of consumer notification under non-fraudulent circumstances:

> Because most of the conduct regulated by the Act involves the conduct of credit reporting agencies and their customers independent of consumers, *see* 15 U.S.C. §§ 1681b-1681f, consumers are not normally immediately aware of violations of the Act.

Through the interaction of the ECOA and the FCRA, in the normal course of consumer credit applications and denials, individuals will be given notice within 30 days of potential problems in their files. *See* Federal Reserve Board Regulation B to the ECOA, 12 C.F.R. § 202.9(a) (2001). There is no occasion for a proper delivery of notice where, as here, the problem arises from identity theft because the agencies unquestioningly accepted that a consumer suddenly has changed her address or is living in separate areas of the country simultaneously and ignored a radically altered pattern of credit transactions. In these situations, victims typically learn of the scam only when they eventually are dunned for payment or are denied credit based on the impostor's activities, just as occurred in this case.

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[2] The events here arose prior to the effective date of the 1996 amendments, which accordingly are inapplicable. This case therefore does not provide an opportunity for determining whether "the date on which liability arises" may be different under the current law in view of Congress's addition in § 1681n(a)(1) of statutory minimum damages without regard to actual damages sustained. *Amici* are not suggesting that a different result is warranted (and do not believe that it is) but wish only to alert the Court to a conceivably material change in the law.

Inherent in Petitioner's argument is its recognition that unless adversely affected consumers can readily discover when a reporting agency has violated their rights, then the statute of limitations impermissibly becomes an all-encompassing exception that eliminates the remedy. In the real world of identity theft victims, the inevitable result of Petitioner's argument is nearly that. Accordingly, Petitioner is not seeking a reasonable interpretation of § 1681p but effective immunity from the remedies established by Congress for its own misconduct.

3. Consumer Reporting Agencies Convinced Congress to Eliminate the Very Access Provision Which Would Have Supported the Position Now Advanced Before This Court

Contrary to Petitioner's current assertions, the FCRA contains no general access provision that would alert consumers to the presence of an identity thief who might be compromising their files. If consumers have reason to believe that they are victims of identity theft, they are entitled to see the contents of their files. § 1681j(c)(3). Otherwise, consumers receive the information only after having been notified of adverse action [§ 1681j(b)] or by paying the reporting agency for the disclosure. § 1681j(a). Therefore, access to the contents of one's report is limited to those who are not victims of identity theft and who properly receive an adverse action notice, to those who already have learned that they have been victimized, and to those who affirmatively request and pay for the report.

In the process leading to its adoption of the 1996 amendments, Congress included a provision that would have permitted all consumers to request and receive disclosure of the contents of their files free once each year. H. Rep. 103-486, 103d Cong., 2d Sess. 13, § 110, H.R. 1015, § 612(c). Petitioner and its industry, however, convinced Congress to delete that provision from the final bill. Had industry joined with consumer groups in urging passage of this general access provision, Petitioner's representation to the Court that the FCRA "enable[s] consumers to discover violations of the Act in a timely fashion" [*Brief for Petitioner* at 27] would have been meaningfully correct. Instead, industry insisted on treating consumers' access to their own personal financial information as a profit center, so that the timely discovery of an unwarranted disclosure at the behest of an impostor still is limited to those consumers for whom there are no violations to discover, those who already have reason to know that they have been victimized, or those who are clairvoyant.

This unwillingness by the three major reporting agencies to communicate with consumers continued long after adoption of the 1996 amendments. Most recently, each of the agencies confessed its noncompliance with § 1681g(c)(1)(B)'s requirement to maintain a national toll-free telephone number accessible to consumers during normal business hours and agreed to the entry of remedial consent decrees with substantial civil monetary penalties and injunctive relief. *United States v. Experian Information Solutions, Inc.*, No. 3-00CV0056-L (N.D. Tex. 2000), available at http://www.ftc.gov/os/2000/01/experianconsent.htm; *United States v. Equifax Credit Information Services, Inc.*, No. 1:00-CV-0087 (N.D. Ga. 2000), available at http://www.ftc.gov/os/2000/01/equifaxconsent.htm; and *United States v. Trans Union LLC*, No. 00C 0235 (N.D. Ill. 2000), available at http://www.ftc.gov/os/2000/01/transunionconsent.htm. Therefore, the notion advanced by Petitioner that the consumer reporting industry is responsive to consumers is disingenuous at best.

4. Petitioner's Claimed Record-Keeping Burden Is Unfounded

Petitioner and its industry are subject to no significant record maintenance burden as a result of the FCRA's statute of limitations, and no resolution of this case will have any substantial impact on its current practices in this regard. Mammoth compilation and maintenance of personal data *is* the business (not the burden) of this industry. If there were no private FCRA remedy at all, this industry would continue to maintain its records in the same manner that it currently does. Industry's record keeping is driven by its business model, not the duration of the limitations period.[3]

Petitioner's records are electronically and digitally stored. The image evoked by Petitioner's argument of warehouses of documents or banks of microfilm is from another century. *Amici* are aware of no practice in this industry of routinely or systematically deleting records after passage of a two year statute of limitations or at any time. Even current technology is capable of maintaining permanent data storage. In any event, memory and capacity are constantly evolving and the cost is decreasing at such rates that Petitioner's assertion not only is unsupported but is a chimera.

Petitioner has provided no factual basis for its argument. To the contrary, *Amici* are informed that evidence in the sealed record in this case actually refutes it. *See* Declaration of Dr. Douglass Stott Parker, Jr., discussing Petitioner's data retention policies. ER6: 287-88.

5. The Only Statutory Balance at Risk Is the Private Enforcement Remedy That Petitioner Now Seeks to Eliminate

It is unfortunately all too evident to *Amici* that the consumer credit reporting industry has insufficient incentives to effectively combat theft of identity. Its monetary customer base is not the victimized consumers whose lives are so devastatingly disrupted, sometimes for years, by their struggle to reverse the damage done to their finances and credit reputation. Instead, as Petitioner recognizes, its customers are credit grantors, who absorb the losses from theft of identity as a relatively small cost of doing business and who likewise have inadequate incentives to pressure reporting agencies to voluntarily engage in the simple computer-matching vigilance and occasional human file review that are needed to stem identity theft. Only the individual consumer whose financial integrity has been compromised has sufficient incentive to take action.

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[3] Further undermining Petitioner's argument, the substantive statutory limit for reporting adverse information is seven years [§§ 1681c(a)(2)-(6)], with certain bankruptcy information lasting ten years [§ 1681c(a)(1)] and no limitation on relatively larger but still modest consumer transactions, such as purchasing a home. § 1681c(b).

Congress clearly recognized the crucial role that consumers have in enforcing the CCPA when it adopted six Titles with private attorney general enforcement provisions. No one has a stake in the integrity of a credit report like the consumer to whom it relates. While the FTC deals as best it can with systemic issues [§ 1681s], Congress has not funded the army of regulators that would be necessary to review the nearly 600 million files that the three major reporting agencies maintain. Congress gave that role to each of the individuals whose tranquillity and material well-being are determined by these faceless, computer-generated reports.

Congress and the FTC both have reaffirmed the Commission's own limitations and this critical role played by consumers. During the 1996 amendment process, the FTC acknowledged that the FCRA "was designed to be largely self-enforcing" and expressed its position directly to Congress that any amendments maintain "the capacity of consumers to bring private actions to enforce their rights under the statute." S. Rep. 103-209, *supra,* at 6. Congress's response was to strengthen private enforcement by encouraging consumer litigation through the adoption of

a specific civil prohibition against unlawful access or use of consumer reports [§ 1681b(f)] and minimum statutory damages [§ 1681n(a)(1)] and creating for the first time a private right of action allowing a consumer to sue furnishers of information for failing to meet their duties in the reinvestigation process. § 1681s-2(b); *DiMezza v. First USA Bank, Inc.*, 103 F.Supp. 2d 1296, 1300 (D.N.M. 2000); *McMillan v. Experian Information Services, Inc.*, 119 F.Supp.2d 84, 88 (D.Conn. 2000); *Whitesides v. Equifax Credit Information Services, Inc.*, 125 F.Supp.2d 807, 812-13 (W.D.La. 2000).

It is this statutory balance that is at risk in this case. If Petitioner's position is sustained, the consumer reporting industry will be permitted to conduct its business, as it has been, with virtually no concern about possible private enforcement of its statutory duties relating to identity theft, so long as it can keep the victimized consumer in the dark for up to two years.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

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